IN THE

Supreme Court of the United States

October Term, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE STATE OF NEW MEXICO

TONEY ANAYA
Attorney General of
New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

PETER THOMAS WHITE,
Special Assistant Attorney General

DON KLEIN,
Special Assistant Attorney General

Bataan Memorial Building
Santa Fe, New Mexico 87503

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The State of New Mexico does not disagree with the statements of the petitioner pursuant to Rules 40(a) and (b) of the Rules of the Supreme Court.

I. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States not only with rights to the use of that amount of water implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, but also provides the United States with rights to the

use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Forest Service?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain?

II. STATUTORY PROVISIONS

Act of July 26, 1866, ch. 262 §9, 14 Stat. 253, 43 U.S.C. §661; Act of July 9, 1870, ch. 235 §17, 16 Stat. 218, 30 U.S.C. §52; Desert Land Act of March 3, 1877, ch. 107 §1, 19 Stat. 377, 43 U.S.C. §321 as amended; Act of October 2, 1888, ch. 1069, 25 Stat. 526, 43 U.S.C. §662; Act of August 30, 1890, ch. 837, §1, 26 Stat. 391, 43 U.S.C. §662; Creative Act of March 3, 1891, ch. 561, §§17-21, 24, 43 U.S.C. §§663, 946 as amended, 947, 948, 949 and 16 U.S.C. 471; Organic Administration Act of June 4, 1897, ch.2, §1, 30 Stat. 34-36, 16 U.S.C. §§473, 475, 482, 551; Act of February 15, 1901, ch. 372, 31 Stat. 790, 16 U.S.C. §522, 43 U.S.C. 959; Act of February 1, 1905, ch. 288, 33 Stat. 628, 16 U.S.C. §524; Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§528-531. Pertinent text is set forth in Appendix A, pp. 1A to 16A. Some of these provisions were repealed by the Federal Land Policy and Management Act of October 21, 1976, P.L. 94-579, 90 Stat. 2743, as noted in the Appendix.

III. STATEMENT OF THE CASE

This suit was begun as a private action to enjoin allegedly illegal diversions of flood waters of the Rio Mimbres in southwestern New Mexico. The Rio Mimbres is an over-appropriated stream historically providing water for irrigation and mining.

Pursuant to §75-4-6, N.M.S.A. (1953), the district court ordered the State Engineer to conduct a hydrographic survey

of the Rio Mimbres stream system, and shortly after its completion, the State of New Mexico on the relation of the State Engineer, moved to intervene under the general water rights adjudication provision of §75-4-4, N.M.S.A. (1953). The Complaint-in-Intervention names as defendants all of the known claimants to the use of the stream system water and prays that each of them "be required to appear before Court and describe fully and in detail what rights, if any, they claim to the use of water. . . ." (A. 18). On July 31, 1970, New Mexico's motion to intervene was granted, effectively transforming the original action into a statutory, stream-system adjudication.

Among the named defendants-in-intervention was the United States of America, joined pursuant to the McCarran Amendment (Act of July 10, 1952, 66 Stat. 530, 43 U.S.C. 666). On Aug. 2, 1971, the United States filed its Answer to Complaint-in-Intervention, claiming water rights under the reservation doctrine for the Gila National Forest – "for use on such land . . . to the extent necessary for the requirements and purposes of said reservation." (A. 28). At a pre-trial conference held on September 26, 1972, it was agreed between New Mexico and the United States "that the United States has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved." (A. 38).

The Special Master's Decision

Trial was held before the Court's Special Master on April 9, 1973. One of the issues then before the Court was whether the reserved rights of the United States would have to be quantified like all other rights. The United States put on two witnesses whose testimony related generally to the difficulties of cataloging and describing all of the water uses made in the Gila National Forest. As to the present uses made in the forest, an inventory was begun in 1970 and revised and completed just prior to trial. (A. 59). While the inventory of water uses did not

distinguish between private uses made by permittees and uses made by the Forest Service (A. 53-54), it became the basis of the Special Master's Finding No. 2, listing all of the present water uses within the Mimbres drainage of the Gila National Forest. (A. 192-193).

With respect to the water uses being made by forest permittees, the Master concluded that any "water rights arising therefrom should be adjudicated to the permittee and not to the United States." (Conclusion No. 9, A. 198).

The Master made findings and conclusions respecting two other classes of reserved right claims. On the basis of a shortlived concession by New Mexico, he concluded that "among the uses to which waters of the Mimbres River Stream System . . . may be properly put are recreational uses incidental to hiking, fishing, camping and hunting." (Conclusion No. 11, A. 198). Based upon evidence of the Forest Service's intention to build two recreational lakes in the headwaters of the Rio Mimbres (A. 91-100), the Master distinguished between diminutive and substantial water uses for recreation, the latter of which he determined were not authorized until the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960. (Conclusion No. 12, A. 198).

With respect to minimum instream flows the United States claimed that reserved rights were necessary to assure flows of two cubic feet per second on three separate tributaries of the Mimbres for "fish purposes" to protect an endangered species of Gila Trout. (A. 89-90). At trial it had become apparent that there were private lands within the forest upstream of the claimed instream flows (A. 109), and at a subsequent hearing on March 6, 1974, respecting the instream flow claims it was stipulated that there were no appropriative water rights appurtenant to the upstream lands.

In principle the Master agreed with New Mexico that rights to minimum instream flows could only be utilized in derogation of private appropriators, but in the limited circumstance where

such rights could be utilized only in derogation of *transferred* appropriative rights (i.e., a change in place of use under New Mexico law to the upstream private lands, thus creating the situation where the Forest Service could theoretically call priority and shut down the transferred use), the Master reached the following conclusion of law:

> In view of the fact that there are no appropriators upstream of the instream uses . . ., and . . . because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs . . . (Master's Conclusion No. 10, A. 198).

Subsequent to trial the United States had urged that the Master recognize reserved rights for minimum instream flows by taking judicial notice "that these live streams not only supported fish but served other valid purposes such as erosion control, fire protection, watershed protection . . . wildlife habitat protection, aesthetics, etc." (A.206). The only evidence in the record in support of the United States' minimum flow claims is testimony on the need to maintain the tributary streams for "fish purposes." The Master's Findings of Fact and Conclusions of Law of May 5, 1975, show no judicial notice of other grounds for minimum flows, as would have been required by New Mexico law.

The District Court's Decision

Upon objections to the Master's Report, New Mexico contended that the United States was not entitled to reserved rights for minimum instream flows, for recreational uses of any

kind, or for other kinds of water uses made by private users and permittees of the forest.

With respect to the three minimum flows for fish purposes recognized by the Master, the United States argued that "as the purposes for these uses, instead of simply listing 'fish,' there should be added, as purposes, the following: erosion control, fire protection, watershed protection, maintenance of natural flow, wildlife habitat protection, aesthetics, etc. . . . " (A.207). New Mexico responded by noting that "the United States is asking the court to ignore the record and the evidence at trial (and) to substitute new 'purposes' for the claimed instream uses. . . . "[1] The district court concluded that "the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were withdrawn from the public domain." (Conclusion No. 11, A. 231).

The district court also concluded "(t)hat recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain. . . . " With respect to the uses listed in the Forest Service inventory, "where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States." (Conclusion No. 9, A. 230). As to livestock grazing the United States has stated that "the Forest Service permittees who (are) allowed to graze livestock inside

1. The United States apparently now disputes this sequence of events. Cf., Supplemental Brief of the State Of New Mexico in Opposition, January 4, 1978. The Master, of course, could not have judicially noticed additional forest purposes (legal conclusions) or a demonstrable need for reserved rights to instream flows for such purposes. On the contrary, he concluded that insofar as water was concerned that the express purposes of the Gila National Forest require the forest administrators to manage "the watershed in such a way as to maximize the water yield to downstream appropriators," i.e., appropriators under state law. (Conclusion No. 10, A. 198).

the forest would have to establish their own rights to the use of Mimbres water under state law." (Brief for the United States, p. 6). None of the listed uses, however, would require a water right in New Mexico.

The New Mexico Supreme Court's Decision

The United States' statement with respect to the decision of the New Mexico Supreme Court is essentially correct.

IV. SUMMARY OF ARGUMENT

I

While there is no dispute over the principle that the United States is entitled to the reserved water rights implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, the parties disagree as to the extent of the principle's application.

In the late 19th century the United States severed the waters of the West from the public domain and relinquished plenary control over those waters to the western states. In 1963, however, the Court announced that the United States' relinquishment was not as complete as western water users had been led to believe. During the interim appropriators under state law believed that water was available to make their appropriations. They could not have reasonably expected that a paramount interest in the same water might be claimed in the future.

Federal reserved water rights and appropriative rights vested under state law contradict one another. The ten western states appearing as *amici curiae* in this case are keenly aware of the problem. The situations of Twin Lakes Reservoir and Canal Company and Phelps-Dodge, Inc., also appearing as *amici curiae*, illustrate the problem.

New Mexico believes that this Court, as well, has recognized that the development of the reservation doctrine

discloses an anamolous jurisprudence in western water law. Accordingly, in our view, the Court has restricted the scope of the United States' reserved rights to a strict standard of necessity. *(Cappaert v. United States,* 426 U.S. 128, 96 S.Ct. 2060 (1976)). Such a standard is wise and represents sound national policy.

II

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L. Ed.2d 542 (1963), is still an active case. New Mexico is a party. The case involves the equitable apportionment of the waters of the Colorado River; the Gila River, which rises in the Gila National Forest in New Mexico, is tributary to the Colorado.

In the text of his Report in *Arizona v. California,* the Special Master expressed an opinion about forest uses, calling the uses forest purposes. He made no findings or conclusions respecting national forest purposes, and none of the parties addressed them in briefs or argument. The question of forest purposes was neither litigated nor determined, and New Mexico is not collaterally estopped from litigating the question now.

III

New Mexico believes that reserved rights arise in satisfaction of the statutorily prescribed purposes for which the Gila National Forest lands were withdrawn from the public domain. The United States agrees, but additionally asserts that reserved rights arise to serve individuals making private recreational and grazing uses of the forest lands as permittees. The United States does not explain why reserved rights do not arise for the many other private uses of water made within the forest.

It is also New Mexico's view that the purposes for which

forest lands might be withdrawn are limited in the Organic Administration Act of 1897 to improvement and protection of the forest lands in order to secure favorable conditions of water flow for appropriators under state law and to provide a continuous supply of timber products. The United States believes that improvement and protection amount to an independent, third purpose. The United States also believes that forests could be reserved under the Act for recreation, aesthetics, and fish and wildlife preservation. The legislative history of the Creative Act of 1891, the Organic Administration Act of 1897, numerous federal rights-of-way statutes, the National Park Service Act, and the Multiple-Use Sustained-Yield Act of 1960 belies the United States' position.

The legislative history of the principal forest and water legislation in the late 19th century demonstrates that New Mexico's view is correct. The history, however, is lengthy and complex. The United States' approach to this history is desultory and superficial and fails to address all but one of the statutes specifically dealing with forest waters. New Mexico has treated the legislative history completely.

New Mexico recognizes that there is reason to be attracted to the United States' claims, but we believe the attraction is naive. In this day and age one would think that forest reserves are far broader in purpose and design than they are. In 1897 Congress firmly endorsed an economic principle of use of forest resources, especially forest waters, in an attempt to foster the economic development of the West. Based on this policy considerable development has occurred. Today, however, economic expansion and development of resources is much less a part of American ideology than it was in the 1890's, and it is easy to overlook the exigencies of the past. The statutes treating the use of waters in national forests must be understood contemporaneously. The United States, instead, wishes to impress modern values on the past. In so

doing, the United States' analysis of the legislation, its history, and its administrative construction is misplaced.

V. ARGUMENT

POINT I

THE PRINCIPLE THAT RESERVED RIGHTS ARE RESTRICTED TO MINIMAL NEED DERIVES FROM SOUND NATIONAL POLICY.

In his opinion in *United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), in which this Court held that the McCarran Amendment embraces the adjudication of reserved rights, Justice Douglas noted that any subsequent "*collision between (appropriative rights and any reserved) rights of the United States*" would generate "federal questions which, if preserved, can be reviewed here. . . . " (*Id.*, 401 U.S. at 526, emphasis added). While those remarks were limited to a different procedural context, the collision between state-created, appropriative rights and federal reserved rights has a broader conceptual impact. As a practical matter, to the extent that reserved rights are recognized, rights created and vested under state law may be diminished. An understanding of this antagonism is essential to the consideration of the scope of the reservation doctrine as it applies to withdrawals of land from the public domain for the creation of national forests.

The antagonism developed historically. During the middle 1800's title to most of the land in the American West had been ceded to the United States by various foreign powers, and until the latter part of the century, it remained in the public domain; that is, it was unencumbered, federally-owned property, subject to sale or other disposition and not reserved or held back for any special governmental or public purpose. There were no private rights in the federally-owned land: miners and others drawn to the West simply took up residence where they saw fit,

acquiring at best possessory interests to the land as implied licensees. While water was being diverted for mining, agricultural, and domestic uses, there was no federal water law governing its use. The United States simply acquiesced in the incipient development of local water law. (See, S. Weil, *Water Rights in the Western States* §94 (1905)).

The need for federal legislation with regard to mining and water was obvious, but it wasn't until 1866 that the first law was enacted:

> Be it enacted that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . . subject to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States . . . .
>
> . . . Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . . (Act of July 26, 1866, ch. 262 §9, 14 Stat. 253, 43 U.S.C. §661 (1970)).

In 1870 the federal government made it clear that grantees of the United States would take their lands from the public domain charged with any existing servitudes. The Act of July 9, 1870, ch. 235§17, 16 Stat. 218, provided that "all patents granted, or preemption or homesteads allowed, shall be subject

to any vested and accrued water rights, or right to ditches and reservoirs used in connection with such water rights . . ."

Finally, Congress passed the Desert Land Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, 43 U.S.C. 321 as amended, which, according to this Court, "effected a severance of all waters upon the public domain, not heretofore appropriated, from the land itself." *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). Concluding, the Court said:

> We hold that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, . . . with the rights in each (state) to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.' (Id., 295 U.S. at 164).

This passage is often cited for the proposition that the Acts of 1866, 1870, and 1877 effected a complete cession of the government's control over all of the non-navigable waters arising on the public domain to the western states, thus, by implication, leaving no water for the government with which to operate its various enclaves which had been or might be carved out of the public domain.

In 1908, however, the Court decided *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, where it was held that when the United States withdrew lands from the public domain in order to establish the Ft. Belknap Indian Reservation, it also impliedly withdrew from the then unappropriated waters of the Milk River sufficient waters to satisfy the purposes for which the lands were withdrawn. "The

power of the Government to reserve the waters and exempt them from appropriation under the state laws," the Court concluded, "is not denied, and could not be." *Winters*, 207 U.S. at 557, citing *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899). The Court reasoned that the United States would not have created a reservation of public lands for the essential purpose of enabling the Indians to become wise in the ways of husbandry without implicitly providing the necessary water.

Between 1908 and 1955, the *Winters* doctrine (or reservation doctrine) underwent only one change. In *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939), where the Pahute Reservation had been set aside not by treaty but by departmental action in 1859, the court, in the spirit of *Winters*, held that there was "no reason to believe that the intention to reserve needs be evidenced by treaty or agreement." (*Id.*, at 336). Until 1955 application of the *Winters* doctrine was restricted to Indian Reservations. The United States treated its non-Indian reservations from the public domain differently. Typically, Congress authorized the appropriation of federal money in order to secure, pursuant to state law, the water rights necessary to the operation and administration of other federal land reserves. (See, e.g., Department of Agriculture Organic Act of September 21, 1944, ch. 412, title II, § 213, 58 Stat. 737, 16 U.S.C. § 526 (1970)).

In 1955, however, the Court surprised the western legal community by seemingly expanding the *Winters* doctrine so that it applied to all withdrawals of land from the public domain:

> In *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955), the Court confirmed the Comission's grant of a license to a private power company to build a dam across the Deschutes River in Oregon over

the protests of that state's Fish and Game Commission. State consent to the project was withheld on the ground that the proposed dam would interfere with the migration of salmon and steelhead. The Deschutes was conceded to be non-navigable and the authority of the Federal Power Commission rested on the fact that the dam would be constructed on federal land, on one side of the river an Indian reservation, on the other a power site reserved in 1909. The Court ruled that the property clause of the Constitution gave the federal government the right to issue the license without the concurrence of the state. Oregon claimed that the water sought to be impounded by the dam was under exclusive state control, relying primarily on the Desert Land Act of 1877 (43 U.S.C. § 321) (1964), which had been said to sever the waters from the western federal public lands and to subject all non-navigable waters to the laws of the states and territories. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). This act, the Court held, was not applicable to the lands before it, because they were "reservations," not "public lands," which are lands open for sale and disposition to the public.

Actual water rights were not involved in the case. The company had no state water right for the project, and the license does not purport to grant a federal right. Nevertheless, it is generally assumed that the power company is now exercising the right of the United States to use the water which it reserved from the jurisdiction of the State of Oregon when it reserved the

power site. (Frank J. Trelease, *Federal-State Relations in Water Law*, National Water Commission Legal Study No. 5, pp. 105-106 (1971)).

With the so-called *Pelton Dam* decision, there was a definite suggestion that the once provincially Indian *Winters* doctrine was suddenly expanded to include any reservation of lands from the public domain, whether for Indians, power sites, national forests or some other reservation. The suggestion was clarified in 1963 when this Court held that the "principle underlying the reservation of water rights for Indian Reservations (is) equally applicable to other federal establishments such as National Recreation Areas and National Forests." *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).[2]

The antagonism between state-created, appropriative rights and federal reserved rights goes beyond the obvious fact that the reservation doctrine takes away from what was thought to have been relegated to the plenary control of the states. With respect to national forest lands the antagonism derives from the

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2. Following *Pelton Dam*, the United States changed its position with respect to federal water claims. It had been the policy of the United States to adhere to appropriation law whenever it became necessary to assert water claims for non-Indian reservations. For example, in 1936 the Forest Service policy was the same as that of other agencies and national institutions: "Rights to the use of water for National Forest purposes will be obtained in accordance with State law." *Forest Service Manual* (1936).

The Agriculture Organic Act of Sept. 21, 1944, ch. 412, title II, § 213, 58 Stat. 737, 16 U.S.C. § 526 (1970), specifically authorized appropriation of funds "for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests." In New Mexico the United States Forest Service proceeded under state law as late as 1955, obtaining in that year two State Engineer permits, numbered 2844 and 2868, authorizing the appropriation of some 2.5 acre feet each in the Gila National Forest.

fact that appropriators under state law had no notice -- even by fiction - of competing federal interests until 1963, i.e., they believed that water was available to make their appropriations, and they could not have reasonably expected that a paramount interest in the same water might be claimed in the future. Secondly, the reservation doctrine provides enough water to satisfy future as well as present water requirements, thus, in a fully appropriated system such as the Mimbres, permitting the United States to make new appropriations with the priority of the original withdrawal, effectively taking without compensation all rights predicated upon intervening uses. In short, the development of the reservation doctrine discloses an anamolous jurisprudence in western water law.[3]

In view of this internally antipathetic situation, the State of Nevada recently argued to this Court that the reservation doctrine should be characterized as "an equitable doctrine calling for a balancing of competing interests." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062,____L.Ed.2d ____(1976). In *Cappaert* it was urged that *Pelton Dam* should be overruled, and the argument was rejected. However, noting that the reservation doctrine is based on necessary inference (*Arizona v. California*, 373 U.S. at 600-601), this Court held that "(t)he implied-reservation-of-water doctrine . . . reserves

3. See Corker, "Water Rights and Federalism -- The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604 (1957); Bradshaw, "Water in the Woods: The Reserved Rights Doctrine and National Forest Lands," 20 Stan. L. Rev. 1187 (1967).

Even the Forest Service recognizes the compensation problem. Section 2541.14 of the *Forest Service Manual* reads:

> In drainage where water has been completely appropriated under state law, subsequent to the reservation date, use of water for National Forest system purposes will be expanded on a more careful evaluation of all water uses and needs to fully justify such expansion. (A. 69).

In the eyes of the western states, "careful evaluation" by forest administrators is a poor substitute for compensation.

only that amount of water necessary to fulfill the purpose of the reservation, no more." While Nevada's argument was rejected, it is likely that its philosophical basis -- viz., the antagonism between state appropriative rights and the federal reservation doctrine -- was not forgotten when the Court limited the doctrine's application to "minimal need." (*Cappaert*, 401 U.S. at 141). Wisely, the Court sought to minimize the conflict.

To have done otherwise would have been to articulate a principle of law most conspicuous for its inherently Kafkaesque nature. The circumstances demanded a limiting principle.[4] In *United States v. District Court for Eagle County, supra,* the Court noted that "(t)he reservation of waters may be only implied and the amount will reflect the nature of the federal enclave." (401 U.S. at 523). In 1971, however, the collision had not occurred. It did occur in *Cappaert,* and the Court confronted the problem by further limiting the reservation to "minimal need, no more."

This case will illustrate the collision profoundly.[5] It is the

4. The fact that the exercise of the reservation doctrine can effectively condemn state-appropriative rights had received considerable, though unconsummated, legislative treatment. See e.g., Moss Bill, S.28, 92nd Cong., 1st Sess. (1971); Hosmer Bill, H.R. 2312, 92nd Cong., 1st Sess. (1971); Kuchel Bill, S.1636, 89th Cong., 1st Sess. (1965); and the Barrett Bill, S.863, 84th Cong., 2nd Sess. (1956).

5. See, esp., the *amici curiae* briefs of Twin Lakes Reservoir and Canal Company, the Southwestern Colorado Water Conservancy District, and Phelps-Dodge, Inc. .

Subsequent to the Court's decision in *Eagle County* and its companion, *United States v. District Court In and For Water Division No. 5, et al.*, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), the reserved right claims of the United States were adjudicated in Colorado. Attached hereto as Appendix B is the Master's memorandum decision in Water Div. No. 5. The Master in that case is Michael White, a visiting professor of water law at Denver University. His decision, of course, is unpublished and is now pending before the Colorado district court on the objections of the United States. The decision, however, contains a scholarly, carefully considered, and highly articulate discussion and resolution of the same issues now before this Court. It is appended hereto because it would not otherwise be available to the Court.

position of New Mexico that the holding and logic of *Cappaert* are of value in this case. We submit that the New Mexico Supreme Court correctly determined the purposes for which the Gila National Forest was established and properly recognized reserved water rights predicated upon the minimal need principal enunciated in Cappaert.

POINT II

THE PURPOSES FOR WHICH FOREST LANDS MIGHT HAVE BEEN WITHDRAWN FROM THE PUBLIC DOMAIN WERE NEITHER LITIGATED NOR DETERMINED IN ARIZONA V. CALIFORNIA.

For the first time the United States asserts that New Mexico is collaterally estopped from adjudicating any question relating to the purposes for which lands might have been withdrawn from the public domain to create the Gila National Forest. It argues that "the issue was litigated and determined by a valid final judgment" in *Arizona v. California, supra,* a case to which New Mexico is a party, involving the Gila River drainage of the Gila National Forest. (Brief for the United States, p. 21). In argument before the New Mexico Supreme Court the alleged determination in *Arizona v. California* was characterized merely as "judicial authority." (Point III, United States' Brief in Chief).

In its brief before this Court the United States urges that it is New Mexico's position "that the question of the purposes of the Gila National Forest remains open because it was not decided 'specifically' by the Court in *Arizona v. California,* but only by the Master." (Brief for the United States, p. 20). The suggestion is that New Mexico hides behind a technicality. The United States' analysis, however, shows only a superficial reading of *Arizona v. California.*

In *Arizona v. California* the following findings of fact and conclusion of law were made in the Report of the Special Master respecting the Gila National Forest:

Finding of fact 30: In withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the Forest. (Rep. 342).

Finding of Fact 31: There is not sufficient evidence to make a finding of the ultimate water requirements of the Gila National Forest. (Rep. 342).

Conclusion of law 11: The United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used. (Rep. 343).

The Recommended Decree of the Master proposed the following provision on the Gila National Forest:

> IV. (E) Provided, however, that nothing in this Article IV shall be construed . . . to affect possible superior rights of the United States asserted on behalf of National Forests . . . ; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used. (Rep. 357-358).

The Master made no findings of fact or conclusions of law on the purposes of the Gila National Forest or other national forests.

In the text of his Report the Master expressed the following opinion:

> There are eleven National Forests in the Lower Colorado River Basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering.[5] (Rep. 96; the footnote is the Master's).

The footnote refers the reader to that portion of the transcript upon which Judge Rifkind was basing his opinion, viz., two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Service. (*Arizona v. California*, Tr. pp. 16014-16015). A reading of Mr. Lyon's testimony clearly indicates that he was talking about forest uses and not the purposes for which forest lands could be withdrawn:

> Q: Mr. Lyon, generally what are the uses which are made of the National Forests?
> A: The National Forests are used for .... (Tr. 16014).

It is clear from the transcript that the question of whether recreation and other forest uses are valid forest purposes within the meaning of the Organic Administration Act of June 4, 1897 (16 U.S.C. §475) was neither litigated nor decided.

Furthermore, this opinion on the purposes of national forests is not reflected in any of the Master's findings or conclusions.[6]

None of the findings of fact or conclusions of law proposed by the United States to the Master reveals a consideration of the purposes of the national forests. (See Proposed Findings of Fact and Conclusions of Law, April 1, 1959, Findings 8.1-8.2, 8.34-8.37, pp. 195, 207-208, Conclusion 8.1, p. 211). The United States' Brief in Support of its proposed findings and conclusions stated that:

> Although we believe there is no issue in this case respecting these rights of the United States (including reserved rights for national forests), the following brief explanation of the law supporting the existence of such rights is submitted. (Brief, pp. 56-57).

New Mexico in its exceptions to the Master's Report stated that:

> Sub-paragraph E of Article IV recognizes the reservation theory as applied to federal lands. New Mexico does not agree in principle with the Winters Doctrine as applied to Indian Reservations nor to the extension thereof to include all Federal Reservations .... However, New Mexico does not take exception to the specific manner in which the reservation theory is applied in the Report and Recommended Decree involving the equitable apportionment of the waters of the Gila River system. (See New

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6. The United States characterizes this explanation as an argument that "the Master's finding was not supported by the evidence." (Brief for the United States, p. 21, n. 10). It should be obvious, however, that our point is simply that the matter wasn't litigated.

> Mexico's Exceptions to the Report and Recommended Decree of the Special Master, pp. 2-3).

The only exceptions to the Master's findings and conclusions on the Gila National Forest were filed by Arizona. (See Arizona's Motion for Adoption, With Exceptions, of the Special Master's Decree, pp. 20-21, February 27, 2961). Arizona objected to the Master's finding of fact 30 and conclusion of law 11. The briefs on Arizona's exceptions did not consider the purposes of the forest as an issue, but instead addressed the fundamental question of whether the Gila National Forest had any rights under the reservation doctrine. (See Opening Brief for Arizona, pp. 192-198; Answering Brief of the United States, pp. 76-79; Reply Brief for Arizona, pp. 69-74).

Nowhere in the findings and conclusions proposed by the parties to the Master, the Master's findings and conclusions, or the exceptions of the parties to the Master's findings and conclusions is there any discussion, let along argument, on the purposes of the Gila National Forest. It is therefore difficult to imagine how the United States can argue that the purposes for which the Gila National Forest was established was an issue "litigated and determined" by a final judgment in *Arizona v. California*. Collateral estoppel requires that a right, question, or fact be "distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery . . . . " *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48 (1897).[7]

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7. While New Mexico believes that the collateral estoppel argument is without merit, the final decree in *Arizona v. California* provides more cogent support on the same principle for the proposition that the United States is collaterally estopped from asserting claims to minimum instream flows in the Gila National Forest. The decree reads: ". . . that in addition to the *diversions* authorized herein the United States has *the right to divert* water from . . . the Gila and San Francisco in quantities reasonably necessary to fulfill the purposes of the Gila National Forest. . . . " Article IV (E). (emphasis added).

The Court agreed with the conclusion of the Master that the United States intended to reserve water sufficient for the future requirements of the Gila National Forest. (*Arizona v. California, supra*, 373 U.S. at 601). The Court decided to allow the parties to submit the form of decree to carry the Court's opinion into effect, rather than adopt the Master's recommended decree with amendments. (*Id.*, 373 U.S. at 602). The Decree entered by this Court adopted without amendment subparagraph (E) of Article IV from the Master's recommended decree. (*Arizona v. California*, 373 U.S. at 350).

POINT III

THE ORGANIC ADMINISTRATION ACT OF 1897 AUTHORIZES THE PRESIDENT TO WITHDRAW LANDS FROM THE PUBLIC DOMAIN TO CREATE FOREST RESERVES TO IMPROVE AND PROTECT THE FOREST IN ORDER TO INSURE FAVORABLE CONDITIONS OF WATER FLOW AND FURNISH A CONTINUOUS SUPPLY OF TIMBER.

In pertinent part the Organic Administration Act of June 4, 1897, reads as follows:

> . . .No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . (16 U.S.C. §475).

In its brief in support of its petition the United States said:

> On its face, this language identifies three purposes that justify establishment of a national

> forest . . . : '(1) improving and protecting the forest, (2) securing favorable conditions of water flows, and (3) furnishing a continuous supply of timber.' The (New Mexico Supreme Court), however, discarded without explanation the first purpose and concluded 'that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber.' (Brief in Support of Petition for Certiorari, p. 10).

On June 30, 1897, with the passage of Organic Administration Act fresh in mind, the Department of the Interior agreed with what was to become the decision of the New Mexico Supreme Court: "Public Forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow." (Department of Interior Circular of June 30, 1897, *Rules and Regulations Governing Forest Reserves Established Under § 24 of the Act of March 3, 1891,* reprinted in H. Docs., 55th Cong., 2nd Sess., Vol. 12, 1897 Report of the Secretary of Interior, pp. cix. et. seq.). It was the understanding of the Secretary of the Interior, then charged with the administration of the nation's timber reserves, that the phrase "improve and protect the forest" was a generic statement facilitating the establishment of forest reserves for the purposes of protecting water yield for appropriators under state law and insuring a continuous supply of timber. As codified in the *Rules and Regulations, supra,* it was considered to be only a statement of congressional intent. It was not a separate purpose. This is amply supported by the legislative histories of forest legislation.

In the early and mid-nineteenth century the attitude of the American public toward the nation's forests and timber lands could best be characterized by indifference:

> Between 1820 and 1870, the population more than quadrupled; a vast number of farms were carved out of the forest, the timber, in the absence of a ready market, being largely burned. "Pines and oaks were remorselessly felled, and every settlement showed what Flint called a 'Kentucky outline of dead trees and huge logs lying on all sides in the fields.' Underbrush was fired with wanton carelessness, and thousands of acres of valuable timber went up in smoke." Hunters sometimes fired the woods to drive the game into the open. Lumbering became more of a commercial business, with larger mills operating. In 1870, there were in the United States 26,945 lumber manufacturing establishments, employing 163,637 hands who, using capital aggregating $161,500,273, produced a total product valued at $252,339,029 -- a greater product that any other manufacturing industry except flouring and grist mills. All this indicates a very effective exploitation of the country's timber resources. (J. Ise, *The United States Forest Policy* 26 (1972)).

Concern for the nation's forest preserves developed slowly. In 1849, the Report of the Comissioner of Patents indicated the first official concern in Washington: "The waste of valuable timber in the United States will hardly begin to be appreciated until our population reaches 50 million. Then the folly and short-sightedness of this age will meet with a degree of censure and reproach not pleasant to contemplate." (*Report,* Com'r. of Patents, 1849, Pt. II, 41 cited in Ise, *supra,* p. 31, n. 30). In 1870, the United States Comissioner of Mining Statistics, R.W. Raymond, attacked the destruction of timber in the mining districts of the Rocky Mountain and Pacific Coast states. (H.R.

Exec. Doc. No. 207, 41st Cong., 2nd Sess. 342 (1870)). In the years immediately following, the Commissioner of the Land Office, Willis Drummond, sought to underscore the importance of the protection of the forests of the public domain. (H. Exec. Docs., 42nd Cong., 3rd Sess., Serial Set Vol. 1560; *Annual Report of the Com'r. of Land Office,* pp. 26-27 (1872)).

The first forest legislation in the United States appeared in the Act of March 1, 1817 (3 Stat. 347), subsequently amended by the Act of May 15, 1820 (3 Stat. 607) wherein the President was authorized to take measures to preserve oak timber on public lands for the Department of the Navy.

In Congress, however, sentiment for conservation of the nation's forests and timber lands was overwhelmed by a hostile lobby:

> The timber interests had been fattening on government lands, and had become a power in Congress, especially since they were allied with some of the land-grant railroads. Throughout the West, the miners also needed timber in their business, and were therefore opposed to conservation, while even agricultural settlers near the timber districts always felt that they were entitled to free timber, and opposed any restriction on its disposal. Stockmen had no particular interest in the timber lands at this time, but they could be depended upon to line up with the other western men. These four classes included a working majority in most of the western states, and the admission of several new states had strengthened the forces naturally opposed to conservation. (Ise, *supra,* pp. 38-39).

In view of the lack of effective national legislation designed to protect timber stands, the individual states addressed the problem by enacting timber culture laws which offered a cash

premium to encourage the successful cultivation of timber. In the 1870's the nation's railroad companies – heavy users of timber – undertook their own tree planting programs. (1891-1892 California State Board of Forestry *Fourth Biennial Report*).

While Congress continued to do nothing about the rampant destruction of forests, the Secretary of the Interior issued a Circular in 1885 directing regional land offices to investigate any report of forest destruction and to stop all timber cutting on the public lands. Because of inadequate funding and appropriation, however, the Secretary's scheme of enforcement was ineffective. In a weak attempt to address the problem, the Congress in 1873 copied the earlier efforts of numerous individual states by passing the Timber Culture Act "to encourage the growth of timber on western prairies." (Act of March 3, 1873, ch. 277, 17 Stat. 605).

The first serious attempt to control the problem of timber destruction,which had gotten decidedly out of hand by the middle 1870's, was a bill introduced in Congress in 1876 by Representative Fort of Illinois. While the bill was not passed, it was the first piece of national legislation suggesting that forest lands should be reserved from the public domain "for the preservation of the forest of the national domain adjacent to the sources of the navigable rivers and other streams of the United States." (H.R. 2075, 44th Cong., 1st Sess. (1875-1876)).

Until 1878, there was no way to acquire timber lands on the public domain except through fraudulent entries under the Preemption Law, the Homestead Act, and the Desert Land Act of 1877. These were numerous. (See, generally, Ise, *supra,* pp. 48-55). When the government made a serious attempt to enforce laws against timber thievery and trespassing, the western states reacted by introducing in the 1870's a number of bills which would have authorized the citizens of the various western states to cut timber for mining, domestic, and other purposes. (See, e.g., H.R. 563, 41st Cong., 2nd Sess. (1869-70)).

These efforts ultimately resulted in the passage of the Free Timber Act and the Timber and Stone Act of June 3, 1873, which launched the United States on a policy of relinquishing its public domain timber lands to private ownership. Some government officials continued to be outspoken about the wisdom of governmental reservation of timber lands, but the timber on the nation's best timber lands passed to private ownership between 1878 and 1891. The Free Timber Act, for example, enabled the residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana to cut timber for building, industrial, agriculture, mining, or domestic purposes.

The most outspoken denunciations of the Act continued to come from the Secretary of the Interior, Carl Schurz. Speaking of the Free Timber Act, he stated that it was "equivalent to a donation of all of the timber lands to the inhabitants of those states and territories. The machinery of the Land Office is wholly inadequate to prevent the depredations which will be committed." As he saw it, "the legislation (would) stimulate wasteful consumption . . . and lead to wanton destruction," and would cause "the mountain sides in those states and territories (to) be stripped bare." (*Report,* Secretary of the Interior, Vols. XIII & XIV, (1878); H. Exec. Docs. 45th Cong., 3rd Sess., Serial Set Vol. 1850 (1878)).

The denuding of the nation's forests continued. In 1878 President Hayes called for timber preservation (*Report,* Secretary of the Interior, pp. 187-197 (1885); H. Exec. Docs. 49th Cong., 1st Sess., Serial Set Vol. 2378, Report of the Secretary of the Interior, pp. 45-46 (1885)), but it wasn't until the administration of President Cleveland that the government took its first uncompromising position on the enforcement of the nation's timber laws. This sudden, vigorous enforcement of the timber laws, however, did not go without congressional reaction. In 1879 Representative Herbert of Alabama introduced a bill designed to relieve trespassers from

prosecution for previous timber theft. (H.R. 1846, 46th Cong., 1st Sess. (1879)). The bill won the unanimous approval of the House Committee on Public Lands, and in final form it relieved all trespassers from prosecution in any civil suit. (21 Stat. 237).

Plundering of the nation's forest lands continued unabated into the 1880's and finally aroused enough public concern to become the subject of several popular magazine articles. (Ise, *supra,* p. 93). Several forestry associations were also formed during this period, and many states appointed forestry commissioners. The Timber Culture Act of 1878, designed to counter forest destruction by encouraging the private cultivation of timber, was a failure.

By this time, however, numerous private industries and government officials were urging that timber lands should be preserved. In the 48th Congress forest reserve measures were introduced by Senators Cameron of Wisconsin, Sherman of Ohio, Miller of New York, Edmunds of Vermont, and Representatives Deuster of Wisconsin and Hatch of Missouri. In 1887 bills were also introduced by Representatives Markham of California, Joseph of New Mexico, Taylor of Ohio, and Holman of Indiana. (See, e.g., S. 1188, S. 1258, H.R. 5206, H.R. 4811, 48th Cong., 1st Sess., (1883), and S. 2451, 48th Cong., 2nd Sess. (1884)). Finally, in 1891 the Congress passed the Creative Act of 1891, revising the nation's timber laws, and enabling the President to withdraw lands from the public domain as forest reserves.[8] Despite the 1891 Act, however, wasteful and destructive timber practices continued, albeit in trespass. In the years that followed, the Secretary of Agriculture, among others, urged that Congress pass restrictive and regulatory legislation. (H. Exec. Docs. 53rd Cong., 2nd Sess., Vol. 19, Report of the Secretary of Agriculture, p. 31 (1893)).

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8. Creative Act of March 3, 1891 (26 Stat. 1095). The 1891 Act prohibited all entry into the forest reserves, creating exclusive federal enclaves. This feature of the Act and orders promulgated thereunder figure importantly in the framing of the 1897 Act.

In 1892 and 1893 numerous measures were introduced in the House and Senate urging more effective protection of the nation's forest reserves. (H.R. 102, S. 2763, S. 3235, 52nd Cong., 1st Sess. (1892); H.R. 10101, H.R. 10207, 52nd Cong., 2nd Sess. (1893)). After making provision for entry on the forest reserves, the Paddock Bill (S. 3235, 52nd Cong., 1st Sess. (1892)), contained the following provision restricting the purposes for which forest lands might be withdrawn:

> §3. That the object of the forest reservations shall be to protect and improve the forest cover within the reservations, for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people of the districts within which the reservations are situated.

Senate Report 1002, the original Interior Department endorsement of the Paddock Bill, which was an elaborate, scientifically oriented justification of the proposed forest reserves and later accompanied the introduction of most of the McRae bills, was also explicit in its discussion of the principle which should govern forest reserves:

> (C) That the object of the public forest reservations is *twofold*, namely, to maintain desirable forest conditions with regard to water flow and at the same time to furnish material to the communities in their neighborhood. (S. Rep. No. 1002, 51st Cong., 1st Sess. (1889); See, also, H.R. Rep. No. 1593, 54th Cong., 1st Sess. (1895) which accompanied H.R. 119 and included S. Rep. No. 1002). (emphasis added).

Congressman McRae, Chairman of the House Committee on Public Lands, introduced in 1893 his first version of H.R. 119.

(54th Cong., 1st Sess. (1895)). As introduced and debated on the floor, the bill contained the following purposes clause:

> §2. That no public forest reservations shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.

The accompanying House Report states that the reservations "are not in the nature of parks set aside for non-use, but they are established solely for economic reasons." (H.R. Rep. No. 897, 53rd Cong., 2nd Sess. (1894)). Congressman McRae's remarks concerning purposes of the reserves clearly establish that timber supply and water flow conditions were the purposes for which the forests could be reserved. Congressman Hermann asked McRae:

> Then is it not the purpose of the forest reservation act to preserve the timber rather than promote its destruction?
>
> MR. McRAE: Certainly, that is the main purpose of this bill. We desire to further guard and protect the timber from spoilation. (25 Cong. Rec. 2374 (1893)).

Congressman Pickler opposed the bill because under the 1891 Act, the forest reserves were in effect, parks for non-use, and the McRae bill would open them for timber cutting:

> MR. PICKLER: But I call the gentleman's attention to the language –
>
> That no public forest reservations shall be established except to improve and protect the forest within the reservation, or for the purpose

> of securing favorable conditions of water flow and continuous supplies of timber to the people.
>
> MR. McRAE: That is the only purpose for which any forest reservation ought to be established. The timber should be so cut as to yield more timber to those who are to come after us. * * * *
>
> *The bill authorizes the President to establish forest reservations, and to protect the forests "for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people."* (25 Cong. Rec. 2375 (1893)). (emphasis added).

In all of the attempted intervening legislation between 1891 and 1897 the "park" purpose of forever preserving the watershed by barring any kind of use at all was abandoned. All of the legislation, including the 1897 Act, was based on the twofold principle of timber protection and watershed management.

Congressman McRae, who had spoken against the 1891 law because it gave the President arbitrary and unregulated discretion in withdrawing forest lands from the public domain, informed the House that his bill restricted this power:

> This bill does not increase the authority over the forests, but, on the contrary, further *restricts it by declaring the purposes for which reservations may be made.* (25 Cong. Rec. 2374 (1893)). (emphasis added).

The language of the Paddock Bill, the McRae Bill of 1893, the Committee Report, and the remarks of McRae on the floor, uniformly construed the purposes for which public lands could

be reserved as forest reserves as the utilitarian purposes of timber supply and securing favorable conditions of water flow. Forest reservations could not be established by the President except for these purposes.

McRae also endorsed the principle of regulated cutting of mature and dead timber in the reserves in order to foster new and vigorous timber growth, while Pickler and Simpson opposed on the theory that, if provided the opportunity to cut at all, the lumbermen would denude the forests. (25 Cong. Rec. 2430, 2432, 2433 (1893)). McRae said:

> (The forests) can not be preserved if you leave the ripe trees to decay and die, and the young trees to dwarf for want of room to grow. There is a certain amount of cutting necessary in these forests to make them thrive and prosper. I want them perpetual and continuous . . . . I want the forests utilized for all legitimate purposes not inconsistent with the *promotion of the growth of the timber cover.* (25 Cong. Rec. 2433 (1893)). (emphasis added).

Pointing out that one of the problems with the 1891 Act was that good agricultural lands were included with the reserves, McRae said:

> "(W)e seek by this bill to remedy that difficulty . . . (by declaring) distinctly the purposes for which reservations shall be made. The great forests of this country shall be preserved for the main purposes stated in this bill. (25 Cong. Rec. 2435 (1893)).

The McRae bill passed the House December 17, 1894. On the Senate side an amended version of the bill was passed February 26, 1895, with the following purposes clause:

> §2. That no public forest reservations shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flow and to insure a continuous supply of timber for the people of the States wherein such forest reservations are located; but it is not the purpose of this act to authorize the inclusion within such forest reservations of lands more valuable for the mineral thereon or for agricultural purposes than for timber.

On June 10, 1896, the House again passed H.R. 119. (28 Cong. Rec. 6410 (1896)). The text of the purposes clause is revealing:

> That the objects for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be to protect and improve the forests for the purpose of securing a continuous supply of timber for the people and insuring favorable conditions of water flow. (28 Cong. Rec. 6410 (1896)).

This provision clearly shows that the twofold reason for forest reservations was continuous supply of timber and favorable water flow and that the forests were to be protected and improved to accomplish these purposes. Protection and improvement of the forests were not, as the United States claims, self-sustaining objects of forest reservations. Protection and improvement were to facilitate providing continuous supplies of timber and securing favorable conditions of water flow.

The twofold need for timber reservations, i.e., to protect the dwindling timber supply and to provide favorable

conditions of water flows, was discussed at length in the various debates and reports on the numerous House and Senate bills introduced between 1891 and 1897.[9] McRae repeatedly stated the congressional concern:

> Common senses and science, I think will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into streams and gives steadier flow, with fewer overflows and less low water.
>
> As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

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9 After maintaining that the New Mexico Supreme Court "inexplicably" concluded that forest lands could be reserved under the 1897 Act for essentially two purposes, the United States argued that "(i)n fact, the government claim of reserved water rights for maintenance of minimum instream flows falls squarely within the purpose of "securing favorable conditions of water flows." (Brief in Support of Petition, pp. 10-11). While there is a certain naive attraction to this argument, it is patently wrong for two reasons.

First of all the legislative history demonstrates unequivocally that the object of "securing favorable conditions of water flows" is to prevent floods and erosion by continued, indiscriminate timber devastation. Favorable conditions of water flows, i.e., the physical retention and retardation of precipitation, is accomplished by prudent watershed management.

Secondly, the Court must distinguish between ample stream flows on the one hand, which only God and decent forest management can provide, and on the other, a water right for a minimum instream flow, *the only utility of which is to cut off a junior upstream user whose rights have vested under state law.* As will be discussed more thoroughly below, the real significance of minimum flow rights diametrically contradicts the purposes of our forest reserves.

> The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent . . . . They are not parks set aside for non-use but have been established for economic reasons.
>
> It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, . . . shall be used, so as not to injure or destroy the primary objects for which they are established. (30 Cong. Rec. 966 (1897)).

Representative Ellis from Oregon emphasized the function of national forests in preserving a water supply, as opposed to maintaining merchantable timber:

> (The people of the West) believe in setting apart reasonable reservations near the headwaters of the stream if you please, especially such as afford water supplies to cities, if there be any such . . . .
>
> . . . as was well remarked by the gentleman from Colorado (Mr. Bell) yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.
>
> I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the

> preservation of the water supply. (30 Cong. Rec. 1006-07 (1897)).

Representative Ellis' remarks were echoed in the same session by Representative Loud from California, whose comments further indicate that the basic concern was to establish and manage forests in order to preserve the waters arising therein for the use of the people below the headwaters:

> . . . I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity as it is for the production of the crops of the great San Joaquin Valley.
>
> That is the main object of the forest reserves in the State of California . . . . (30 Cong. Rec. 1399 (1897)).

Finally, the "Report of the Committee upon the Inauguration of the Forest Policy" (S. Doc. No. 105, 55th Cong., 1st Sess. (1897)), upon which the Congress relied in considering the Organic Administration Act, emphasized the same twofold principle:

> The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century . . . .
>
> Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public

> domain, for their influence on the flow of streams and to supply timber and other forest products . . . .
>
> It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. (S. Doc. No. 105, p. 36, 55th Cong., 1st Sess. (1897)).

Nothing in the debates preceeding the 1897 Act furnishes a conclusion that the forests could be reserved for the purpose of preservation and improvement alone, without reference to timber or water flows. In one of the closing exchanges between Smith of Arizona and McRae the same twofold principle that survived the entire movement of the 1890's is readily apparent:

> MR. SMITH: What is the purpose of the reservation?
>
> MR. McRAE: To conserve the water flows and to furnish a continuous supply of timber for the people. (30 Cong. Rec 967 (1897)).

In view of this legislative history there can be no doubt that the restrictive purposes for which timber land might be reserved under the 1897 Act are the same *two* purposes enumerated by the Secretary of the Interior in promulgating the *Rules and Regulations* governing forest reserves on June 30, 1897, just 26 days after the Act was passed. Further substantiating this view is the "Report of the Committee

Appointed by the Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States." On February 15, 1896, Hoke Smith, the Secretary of the Interior, then charged with the administration of the public domain, requested the National Academy of Sciences report to the Department on "a rational forest policy for the forested lands of the United States." (S. Doc. No. 105, p. 7, 55th Cong., 1st Sess. (1897)). Specifically, the Academy was asked:

> 1) Is it desirable to maintain permanently as forested lands those portions of the public domain now bearing wood growth, for the supply of timber?
>
> 2) How far does the influence of a forest upon . . . water conditions make desirable a policy of forest conservation in regions where the public domain is principally situated?
>
> 3)What specific legislation should be enacted to remedy the evils now confessedly existing? (S. Doc. No. 105, p. 7, 55th Cong., 1st Sess. (1897)).

In response the Academy drafted a lengthy report which was read to the Congress on May 25, 1897; the report, in its entirety, supports the position asserted by New Mexico in the case at bar. In discussing the Academy's proposed system of forest administration, it was stated that:

> (i)t has been shown that the preservation and judicious management of the forests on those portions of the public domain which are unsuited for agriculture are of great importance for the flow of rivers needed for irrigation of arid districts, and to furnish forest products for

> settlers on adjacent arable lands, and for mining operations. (S. Doc. No. 105, p. 23, 55th Cong., 1st Sess. (1897)).

As Appendix B to the *Report* the Academy proposed an actual bill which began:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that the objects for which public forest reserves shall be established under the provisions of the (1891 Act), shall be to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow. (S. Doc. No. 105, Appendix B, 55th Cong., 1st Sess (1897)).

Like McRae, the principal sponsor of the legislation ultimately adopted three weeks later, and the Secretary of the Interior, then responsible for the administration of the forest reserves, the National Academy of Sciences believed that the object of "improving and protecting the forest" was a generic statement facilitating the establishment of forest reserves for the purposes of protecting water yield for appropriators under state law and insuring a continuous supply of timber. In the twentieth century the same view has been expressed. The Circular of April 4, 1900, containing the Secretary's regulations respecting forest reserves, for example, provides:

> 2. Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to

> continuous water flow. (*Compilation of Laws, Regulations and Decisions Thereunder, Relating to the Establishment of Federal Forest Reserves, Under §24 of the Act of March 3, 1891 (26 Stat. 1095), and the Administration Thereof, 15 (1903),* hereinafter cited as *1903 Compilation.*[10]

In response to this century of legislative history the United States urges that the language of the Organic Administration Act identifies three distinct "purposes that justify establishment of a national forest," viz., "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." The first alleged purpose, however, states no goal or object justifying the improvement and protection that the Act solicits. As plain logic and all of the legislative history indicate, it only describes in general the objective that the purposes which followed were

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[10] The United States has pointed out that:

> 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall v. Tallman,* 380 U.S. 1, 16. This is particularly so when the administrative practice 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and, smoothly while they are untried and new.' *Power Reactor Co. v. Electricians,* 367 U.S. 396, 408, quoted in *Udall v. Tallman,* 380 U.S. 1, 16. (Brief for the United States, p. 51).

New Mexico agrees with the legal principle, but believes it supports the decision of the New Mexico Supreme Court instead of the position taken by the United States. If there were a choice, this Court could apply the principle to the rules and regulations promulgated by the Secretary of the Interior or to selective and inconclusive citations to the writings of B. E. Fernow. (See, Brief for the United States, pp. 43-52). Fernow, however, did not address the matter directly. The Secretary did.

intended to achieve. The United States, however, has subordinated syntax to grammatical arrangement, and because the sentence is seemingly structured as a series of three purposes, argues that the first "purpose" exists independently of the second two. However, it tells us nothing about *why* the forests were to be improved and protected.

By no stretch of the imagination could the President have reserved forest lands under the Acts of 1891 and 1897 to protect wildlife habitat or fish. As should be abundantly clear, forests were to be improved and protected for only two reasons. It follows that Congress could not have implicitly intended that water rights would arise except in satisfaction of the two purposes for which the forest lands were withdrawn. Indeed, the very act of withdrawal was designed to protect the forests. The two purposes behind the withdrawals form the genesis of the United States' reserved water rights.

POINT IV

THE UNITED STATES CAN HAVE NO RESERVED RIGHTS TO MINIMUM INSTREAM FLOWS FOR "FISH PURPOSES," WILDLIFE HABITAT, OR AESTHETICS UNDER THE ORGANIC ADMINISTRATION ACT OF 1897, AND THE RECORD CONTAINS NO EVIDENCE OF A NEED FOR MINIMUM INSTREAM FLOWS FOR ANY OTHER PURPOSE

In its introduction to Point III the United States suggests that it has always maintained in this case that "the maintenance of minimum instream flows (is) necessary not only for 'fish' purposes but also for the purposes of 'erosion control, fire protection, watershed protection, (and) wildlife habitat

protection . . . .' " (Brief for the United States, p. 23). The only evidence in the record in support of minimum instream flows, however, is the testimony regarding the need to protect Gila trout (A. 89-90). No other need was evisioned at trial, and no other claim was made. Subsequently, in argument before the district court, the United States urged that the need for instream flows for fish purposes be supplemented in the court's decree by judicial notice of a need for instream flows for the above-mentioned additional "purposes." (A. 207) No such notice was taken – or could have been – by either the Special Master or the district court.

On appeal the United States attempted to persuade the New Mexico Supreme Court that reserved rights to minimum stream flows were implicitly reserved for additional purposes, i.e., "aesthetic, environmental, (and) recreational . . . purposes," despite the fact that there was no evidence in the record demonstrating a need for such rights. Based upon the conclusion that these asserted forest purposes, as well as the previously asserted fish purposes, were not purposes for which the Gila National Forest lands could have been withdrawn from the public domain, the New Mexico Supreme Court concluded that instream uses for these purposes "were not contemplated." (A. 241). The court did not, as the government urges, hold that "the United States ha(s) no reserved rights to water for maintenance of minimum instream flows for *any* purpose." (Brief for the United States, p. 24). (emphasis added). Based upon the record, i.e., the demonstrated needs of the United States, the Court concluded that rights to instream flows cannot exist in satisfaction of purposes other than those expressed in the Organic Administration Act of 1897. With respect to the belated argumentative claim that such rights might be needed to insure minimum stream flows for "erosion control, fire (and) watershed protection," matters conceiveably within the ambit of the Organic Act, there was neither evidence nor judicial

notice upon which the Court could have volunteered an opinion.[11]

As to its presently adjudicated reserved rights it is true "(t)hat the United States does not have rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain." (Conclusion No. 11, A. 231). As to its claims for reserved rights for future needs the matter has not been fully determined.

A. *Minimum instream flows for fish and wildlife purposes are not authorized under the Organic Administration Act of 1897.*

The Organic Administration Act of 1897 did not authorize the United States to preserve or protect fish and game in national forests. Neither did it authorize federal management, protection, or preservation of wildlife. These matters were left strictly to the states. No reserved rights for fish or wildlife can be implied in the Gila National Forest prior to the enactment of the Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§528-531, because such an implication would be inconsistent with Congress' express intent to leave fish and game management and regulation to the states.

While it is evident from the legislative histories of the Creative Act of 1891 and the Organic Administration Act of 1897 that fish and wildlife purposes were not among the purposes for which the Gila National Forest lands could have

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[11] As New Mexico earlier pointed out, the United States is not barred from asserting that rights to minimum instream flows might be necessary for erosion control or fire protection on the basis of the recognized purposes of watershed management and the maintenance of timber. (Supplemental Brief of the State of New Mexico in Opposition, p. 4). Indeed, the United States has done so in state court in New Mexico subsequent to the decision below. *State ex rel. S.E. Reynolds v. L.T. Lewis, et. al.*, Chaves County Cause Nos. 20294 and 22600. In this context questions of fact instead of law are raised. Need must be demonstrated.

been reserved, the same conclusion is compelled by other actions of Congress.

In 1893 and 1894 the Department of the Interior requested provisions for the protection of game and natural curiosities within both national parks and forests. (H. Exec. Docs. 53rd Cong., 3rd Sess., Vol. 14, Report of the Secretary of the Interior, Vol. 1, pp. LXXIV – LXXV (1894)). The McRae bill of 1896, H.R. 119, contained such a provision:

> §2. That the Secretary of the Interior shall make such rules and regulations and establish such service as shall be required . . . to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be thereon, from waste, injury, fire, spoilation, or other destruction . . . . (28 Cong. Rec. 6410 (1896)).

However, the Senate did not pass it in 1896, and the provision was not included in the Pettigrew Amendment as it passed the Senate in 1897. On the House side, Congressman McRae printed his 1896 bill in preparation for offering it as an amendment to the 1897 legislation. It was considered but never enacted. (30 Cong. Rec. 899-902, 924, 988, 1033 (1897)). The Conference Committee report, S. Doc. No. 102, 55th Cong., 1st Sess. (1897), contained no provision respecting game, natural wonders or curiosities, or preservation of the natural resources of the forest reservations.

The omission of the 1896 House version from the final law evinces congressional intent not to authorize the Secretary of Interior to promulgate regulations for the preservation of game. Instead, it shows that Congress decided to leave such regulation within the purview of state administration, absent special legislation.

In 1901 Gifford Pinchot inquired whether under the Act of

June 4, 1897, he could "make such (forest) reserves the refuges for game, in order to its preservation –" (23 Op. Att'y. Gen. 589 (1901)). Construing the 1897 Act and the recent decision of Congress that state laws should apply to fish and game instead of secretarial regulation, Attorney General Knox concluded that "the Secretary of Interior is not authorized to prescribe rules and regulations by which the national forest reserves may be made refuges for game, ..." (*Id.*, at 594).

New Mexico's view is also supported by other contemporaneous legislation. In 1905, Congress passed the first of a series of seven special acts authorizing the creation of fish and game preserves within specific national forests, indicating Congressional understanding that special legislation was required to create game preserves. Groundwork for this special legislation had been laid in the years 1901 to 1905. In 1901, "(t)he President . . . (had) asked for the enactment of laws creating game preserves in these forest reserves." (Letter from Rep. John F. Lacey to Attorney General Knox, Dec. 5, 1901, reprinted in *1903 Compilation, supra,* pp. 90-91). Under the sponsorship of Congressman Lacey, H.R. 11584, 58th Cong., 3rd Sess. (1904-1905), became the first of the special acts for this purpose. The House report on the bill recites:

> The Wichita Forest Reserve has been set apart in the Wichita Mountains in Oklahoma. This mountainous tract of land is surrounded on all sides with farming lands and has been reserved as a permanent timber reserve. The bill proposes to permit the President of the United States to designate such a part of the said reserve as in his opinion may be proper also as a game preserve for animals and birds. *The President in one of his messages has asked that this authority be given as to all the forest reserves in the United States. He recommended that the Executive be permitted to designate portions thereof as*

> *havens of refuge for the small remaining portion of our game and birds. Congress thus far has not favorably acted upon any such a general law.* (39 Cong. Rec. 284 (1904)). (emphasis added).

If the President requested authority from Congress in 1901 to designate portions of certain forests as game preserves, he cannot be said to have the authority under the 1897 Act to reserve waters for game and fish preserves in general.

The Act of January 24, 1905, 33 Stat. 614, 16 U.S.C. §§684-686, furnished the pattern for the special Acts of Congress respecting game preserves within the national forests until 1933.[12] However, President Theodore Roosevelt's request in 1901 for general legislation allowing fish and game preserves within the national forests did not receive congressional attention until 1934. The Act of March 10, 1934, 48 Stat. 400, 16 U.S.C. §694, was enacted as part of comprehensive fish and game conservation legislation. (See, 78 Cong. Rec. 2010-2011, 3726-3728 (1934)). As was said on the House floor, this law "provides a power in the Government to establish these sanctuaries on forest reserves." (78 Cong. Rec. 3727 (1934)). The law continued to guard the authority of the states over fish and game by providing that no such reserve could be established within a national forest without the consent of the legislature of the state affected. There is no claim that the Gila National Forest has been declared a fish and game preserve under this Act.

To hold that the United States has reserved water rights for for minimum instream flows for fish habitat or game consumption in forest reserves under the 1897 Act would be contrary to the course of legislative and executive construction

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12 Act of June 29, 1906, 34 Stat. 607; Act of June 5, 1920, 41 Stat. 986; Act of June 7, 1924, 43 Stat. 634; Act of Feb. 28, 1925, 43 Stat. 1901; Act of June 3, 1926, 44 Stat. 821, 889; Act of June 22, 1930, 46 Stat. 827; Act of June 13, 1933, 48 Stat. 128. See, generally, 16 U.S.C. §480-488.

of the 1897 Act and the special and general legislation in this area. Forest reserves and game and fish reserves are separate. The claim of reserved water rights for fish and game purposes predicated upon the purposes for which forest lands could be reserved under the 1897 Act is contrary to the explicit Congressional separation of the two.

B. *The United States has not demonstrated a need for reserved rights to minimum instream flows to improve or protect the Gila National Forest in order to secure favorable conditions of water flow or to provide a continuous supply of timber.*

The New Mexico Supreme Court is not the only court of last resort in the western United States which has concluded that the Organic Administration Act authorizes the withdrawal of forest lands for the two purposes of securing favorable conditions of water flows and providing a continuous supply of timber. The Supreme Court of Idaho recently reached the same result:

> The United States argues that the phrase "to improve and protect the forest within the boundaries" is a separate and distinct purpose for the creation of national forests and refers not only to the protection of trees, but also to the protection and improvement of the entire forest ecosystem, including fish and wildlife, and the forest's aesthetic and recreational qualities. This argument, however, finds no support in the legislative history of the Act. Despite repeated references in the congressional debates to the need to preserve timber resources and protect watersheds, no mention is made of fish and wildlife or the aesthetic and recreational

> qualities of the forests.[13] *Avondale Irrigation District, et al. v. North Idaho Properties, Inc. and Soderman v. Kackley,* Nos. 12174 and 12482 Consolidated, Supreme Court of Idaho, filed March 15, 1978.[14]

In its brief the United States spends a good deal of time referring to the emphasis given by numerous congressmen and others of the need to improve and protect forest lands. (Brief for the United States, pp. 31-36). The United States' analysis of the legislative history, however, is superficial, never once addressing the essential part of the history that tells us *why* Congress wanted to improve and protect forests. The Master in Water Division No. 5 in Colorado shares this view of the United States' analysis:

> The United States also contends that the use of the words "... to improve and protect the forest within the boundaries ...," *see* 16 U.S.C. §475, by Congress in its statement of forest purposes somehow expands the original purposes of the forest beyond those of watershed protection and timber preservation. It

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13 Citing, "e.g., 30 Cong. Rec. 899-917, 963-1010 (1897) (debates preceding the enactment of the Organic Act of 1897); 25 Cong. Rec. 2371-75, 2430-35 (1893), and 27 Cong. Rec. 85-86, 109-15 (1894) (committee report and debates on the 1892 McRae Bill, H.R. 119. This bill which was passed by the House but not the Senate, is the forerunner of and substantially the same as the Organic Act of 1897). *See Generally* Bassman, the 1897 Organic Act: A Historical Perspective, 7 Nat. Res. Law. 503 (1974)."

14 As of this writing the decision of the Idaho Supreme Court is unpublished. Consequently, it is printed in part herein as Appendix C for the Court's convenient reference.

claims that this phrase somehow encompasses recreational and other purposes not otherwise explicit in the Act. The Master-Referee does not agree.

First of all, such an interpretation is wholly inconsistent with the cases which have addressed the purposes of the Organic Act. *See,* for example, *United States v. Grimaud,* 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911); *Light v. United States,* 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Hunt,* 19 F.2d 634 (9th Cir. 1927); *United States v. Johnston,* 38 F. Supp. 4 (D.W. Va. 1941); *United States v. Shannon,* 151 Fed. 863 (D. Mont. 1907); *see also, Honchak v. Hardin,* 326 F. Supp. 988 (D.C. Md. 1971). Those cases clearly indicate that the essential purposes of the forest expressed in the Organic Act are limited to watershed protection and timber preservation. Forest improvement and protection are merely mechanisms to assure that the forests maintain their value as such.

In addition, the words of the Act themselves are clear as to the meaning of this phrase. At most, the phrase can be read to relate to the need to regulate and protect the forests in order that they may retain their value as protectors of the watershed and sources of timber supply. Nothing in the Organic Act, in 16 U.S.C. §475 or otherwise, hints that the purposes of the forest were to be greater than those. To so interpret the cited phrase would expand the meaning of the Act beyond its own limits and

the interpretations of reviewing courts. (Partial Master-Referee Report, App. B, p. 72b).

While the United States can have no reserved rights for minimum instream flows based upon improvement or protection of the Gila National Forest independent of the purposes for which the forest lands were withdrawn, it does not follow that such rights might not arise *based upon* those purposes. In this regard the United States presented no evidence, apparently unaware of any need for such rights at trial. Instead, it is asserted rhetorically that "(t)he need is not academic, nor the danger unreal." (Brief for the United States, p. 29).

There is no question that the burden of going forward and the burden of proof in this regard were on the United States. (Kinney, *Irrigation and Water Rights* §1554 (1912)). Instead of proving a need, however, the United States simply asserts that reserved rights to instream flows are needed for fire protection and erosion control as if these were facts that cannot be questioned. Not only is there no evidence upon which to demonstrate a need; there is no way to tailor the adjudication decree "to *minimal* need." (Cappaert, 426 U.S. at 141).[15]

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[15] With regard to fire protection it should be borne in mind that the claim is for an *instream* use and not for a need to *divert* water from the stream to put out forest fires, for which a water right would not be needed in any event. In *State ex rel. S.E. Reynolds v. L.T. Lewis, et al.,* Chaves County Cause Nos. 20294 and 22600, *supra,* the evidence the United States offered with respect to fire protection was designed to show that wet banks don't burn -- not that the water in the stream would stop forest fires. With respect to erosion control it was urged that wet banks and beds would be scoured less easily by heavy runoff. It is not likely that the former assertion would justify shutting down the "private appropriators (who) have long been permitted to remove water from national forest lands for private purposes, including substantial uses such as those involved in mining and irrigation." (Brief for the United States, p. 30). The latter assertion is even less persuasive. The claims of instream flows for erosion and fire control, etc., are matters of fact for trial.

C. *The statutory purpose of securing favorable conditions of water flows contradicts the claim of reserved rights for instream flows.*

While the United States appears to recognize that the preservation of "favorable conditions of water flows" relates to prudent watershed management, i.e., insuring that the forest cover retards and controls precipitation and runoff (Brief for the United States, pp. 37-40), it concludes that the statutory language requires that the water be kept in the streams to the detriment of those persons for whom Congress sought to protect the flows. The United States thus ignores the fact that Congress contemplated private appropriations from the streams. Apparently making reference to the "private appropriators (who) have long been permitted to remove water from national forest lands" (*Id.*, p. 30), the United States explains that "Congress . . . could not have intended that the national forests could be artificially deprived of a minimum natural flow in the forest stream." (*Id.*, p. 40)[16]

This argument was also addressed by Mr. White in the Water Division No. 5 proceedings:

> The Organic Act itself makes it clear that enhanced water supplies created by the reservation and protection of the forests were to be available for use by appropriators. According to that Act, as now codified at 16 U.S.C. §481:

16 After losing its attempt to avoid quantification in McCarran Amendment proceedings, the United States has asserted in at least one court that it has a reserved right to the entire natural flow of forest streams. In response, the Idaho Supreme Court commented that "(i)t would be indeed anamalous . . . to infer, as the United States asks (us) to do in these cases, a congressional intent to reserve the entire natural flow of these streams when Congress explicitly authorized and contemplated private consumptive use of these same streams." (App. C, p. 7c).

> "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The very terms of this section indicate that "all" waters provided by the national forests were to be available for utilization by appropriators for various purposes. Indeed, the Forest Service has followed this dictate by granting to appropriators rights-of-way across forest lands under the Right of Way Act of 1891, 43 U.S.C. §946 *et. seq.*, the Right of Way Permit Act of 1901, 43 U.S.C. §959, and the Forest Right of Way Act of 1905, 16 U.S.C. §524. These rights-of-way have allowed appropriators to enter and take water from the forests in fulfillment of various off-the-forest needs. This is in conformity with the terms of the Organic Act. To say that the utilization of reserved waters to maintain minimum stream flows and lake levels would somehow fulfill the purposes of the forests as stated in the Organic Act would truly be illogical and inconsistent with (its) purposes. (App. B, p. 109b).

The United States cites and discusses one statute relating to the use of waters within the national forests, viz., 16 U.S.C. §481, *supra*. Others deal specifically with forest water.

In the Act of September 2, 1888, 25 Stat. 526, as amended, 43 U.S.C. §664, Congress provided that:

> All the lands which may hereafter be

> designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject from the passage of this act to entry, settlement, or occupation until further provided by law.

The reservation was effectuated by a General Land Office Circular of August 5, 1889, which states:

> The object sought to be accomplished by the foregoing provision is unmistakeable. The water sources and the arid lands that may be irrigated by the system of national irrigation are now reserved to be hereafter, when redeemed to agriculture, transferred to the people of the Territories in which they are situated for homesteads, (S. Rep. No. 928, 51st Cong., 1st Sess., pp. 12-13 (1890)).

The Act removed 1,350,000 square miles of land from entry, stopping all homestead, desert land, or other filings in every state west of the 100th meridian. The Act also reserved to federal control all water sources of the affected public domain. (29 Cong. Rec. 1955 (1897); 21 Cong. Rec. 7271, 7273-4 (1890); S. Rep. No. 928, 51st Cong., 1st Sess., pp. 12-13 (1890)). This reservation of public lands was recommended by Maj. John W. Powell, Director of the United States Geological Survey, as the initial step in the proposed development of a nationally controlled system of irrigation in the arid West. (See, S. Rep. No. 928, 51st Cong., 1st Sess.,

pp. 12-13 (1890); S. Rep. No. 1466, 51st Cong., 1st Sess., p. 58 (1890); *Tenth Annual Report, U.S. Geological Survey*, Part II, pp. 4-8 (1889–1890)).

A sudden and radical departure from national land and water policies (Point I, *supra)*, Powell's plan provoked "a perfect storm of indignation from the people of the West. . . . " (29 Cong. Rec. 1955 (1897)). In response, the Senate Special Committee on Irrigation and Reclamation of Arid Lands conducted hearings which resulted in a six volume committee report on March 8, 1890, containing majority and minority porposals for federal laws controlling the development of irrigation. The majority report proposed federal reservation of all waters in the West and delegation of control of intrastate waters to the respective states, retaining in the United States the right to resolve all disputes concerning the storage and distribution of interstate waters. (S. Rep. No. 928, 51st. Cong., 1st Sess., pp. 13 (1890)).

The Senate Appropriations Committee held separate hearings, reported in S. Rep. 1466, 51st Cong., 1st Sess. (1890), in which Maj. Powell defended his national irrigation proposals. Powell asserted that national control of the lands to be irrigated, of the location of works, and of distribution of water to the lands, would result in more efficient, systematic irrigation in the West. (*Tenth Annual Report, U.S. Geological Survey, supra;* S. Rep. No. 1466, 51st Cong., 1st Sess. pp. 58, 134-136 (1890)). Opponents pointed out that the impact of Powell's proposals would be impairment of water rights vested under local law, uncertainty and hardship. (S. Rep. No. 1466, 51st Cong., 1st Sess., pp. 60, 64, 71, 74, 117 (1890)). The opponents also took the view that the states should control the waters because Congress did not have the knowledge or experience to legislate the use of water. (21 Cong. Rec. 7272 (1890)).

The Act of September 2, 1888, was repealed in the Civil Sundry Bill for 1891, Act of August 30, 1890, 26 Stat. 391,

43 U.S.C. §662. Thus, the proposal for national control of waters in the West was rather abruptly abandoned, leaving control of the diversion and distribution of waters to the states.

State control of water in the West was not limited to the public domain. Section 18 of the Act of March 3, 1891, 26 Stat. 1095, as amended 43 U.S.C. §946, the same law which provides for the establishment of forest reserves in §24, extended state control of water to the reservations of the United States. Before its repeal in the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793, it provided:

> That the right of way through the *public lands and reservations* of the United States is hereby granted . . . for the purpose of irrigation . . ., to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals . . .; Provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and *the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories.* (emphasis added).

Section 18 was part of an omnibus bill prepared by a committee of nine Senators to overhaul parts of the nation's public land law. The extension of state law to federal reservations was designed to provide public use and occupancy of the reservoir sites still withdrawn under the 1888 and 1890 Acts. (29 Cong. Rec. 1948 (1897)). The Act of March 3, 1891 was in part a response to the "crude" provisions of the 1888 reservation law. (29 Cong. Rec. 1948, 1955, (1897)).

The version of §18 first adopted in the Senate referred only to rights of way across public lands; it contained no reference to state control of waters or federal reservations. (21 Cong. Rec. 10454-10455 (1890)). The extension of the rights of way to federal reservations, as well as the provision recognizing state control of waters, were both added in the House-Senate conference version, which was adopted without debate as to §18. The Creative Act. §24 of the bill, was also added in the House-Senate conference. (22 Cong. Rec. 3784-3789, 3831-3833 (1891)). By §§18 and 24 of the 1891 Act, Congress expressly recognized state control of the waters of the forest reservations.

Beginning in 1894, the Secretary of Interior construed the 1891 Act to give the states and territories control of the flow and use of waters within federal reservations under the Act. The Department of Interior Circular of February 20, 1894, provided:

> The *control of the flow and use* of the water *is* therefore a matter *exclusively under State or Territorial control,* the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands. (18 Interior Dept. Decisions 168, 169-170 (1894)). (emphasis added).

The right of way applicant was required to furnish proof of a water right under state law. (*Id.*,pp. 170-171).

Fifteen days later in *H. H. Sinclair, et. al.*, the Interior Department stated:

> Section 18 of the Act of Congress approved March 3, 1891 (26 Stat., 1095), grants the right of way through government reservations

> for canals and reservoirs for irrigating purposes, provided they shall not be so located as to interfere with the proper occupation thereof by the government. (18 Interior Dept. Decisions 573 (1894)).

The opinion further states that § 18 of the Act of March 3, 1891:

> (r)elegate(s) the matter of *appropriation and control of all natural sources of water supply in the state of California to the authority of that state.* The act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes or irrigation, leaving the disposition of the water to the state. (*Id.*, at 574). (emphasis added).

This departmental construction of the 1891 Act was continued in later decisions and regulations, viz., "(t)he control of the flow and use of the water is therefore, so far as this act is concerned, a matter exclusively under State or Territorial control," through the 1905 Regulations, (34 Interior Dept. Decisions 212, 214 (1905)); and the 1908 Regulations, (cf. 36 Interior Dept. Decisions 567, 568 (1907). 43 C.F.R. § 2802.1-5(b) (1976) requires proof of a state law water right whenever the project for which the right of way is sought involves the storage, diversion or conveyance of water. Under these regulations, the Secretary has required that a state water right be proved by the right-of-way applicant if the right of way "in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes. . . ." (36 Interior Dept. Decisions 567, 568 (1907); cf., 34 Interior Dept. Decisions 212, 214 (1905)).

The administrative construction of the 1891 law was judicially upheld in *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228 (D.C. Cir. 1936), where the Secretary's power under the 1891 Act to require a state law water right as a pre-requisite to granting a right of way was challenged. In state court general adjudication proceedings, the company had been adjudicated to have no water right for the purposes and uses for which it sought the grant of a canal right of way from the Secretary of Interior. On the company's application for mandamus, the refusal was upheld. The court said of the state water right reqirement:

> Similar requirements existed in earlier regulations. 34 L.D. 212; 30 L.D. 325; 27 L.D. 200; and as early as February 20, 1894, 18 L.D. 168. All these regulations required the submission of evidence of applicant's right to appropriate water under the applicable state laws. It will be observed that *for a period of more than forty years these regulations and requirements have been in force and complied with by applicants for ditch rights under the statutes here involved.* A policy reasonable in every respect and so long observed and followed by the Department of the Interior is entitled to liberal construction and consideration, and it will not be lightly overthrown by the courts. *United States v. Union Pac. Ry. Co.*, 148 U.S. 562, 572, 13 S.Ct. 724, 37 L.ED. 560; *Hawley v. Diller*, 178 U.S. 476, 488, 20 S.Ct. 986, 44 L.ED. 1157. (*Id.*, pp. 230-231). (emphasis added).

Concerning state and federal jurisdiction under the Act, it was said:

It will be observed that while the broad policy here established constitutes a present grant of rights of way through public lands and reservations to canal or ditch companies and individuals for the construction of irrigation works, *the jurisdiction conferred is dependent upon a cooperative jurisdiction to be exercised by the states. The states control the water and distribution thereof within their respective jurisdictions,* and the ditch company, to operate under the authority conferred by the general government, must first secure from the state a water right sufficient to furnish water for successfully carrying out the proposed project. The appropriator must then secure from the Secretary of the Interior an approval of its right of way for the construction of the ditch or ditches. (*Id.*, p, 231). (emphasis added).

Congressional construction of §18 of the 1891 Act is fully in accord with the regulations of the Secretary of Interior and judicial construction of the Act. Congress had occasion to debate the 1891 Act in 1897, in consideration of H.R. 1948, 54th Cong., 2nd Sess. (1897), which was enacted into law as the Act of February 26, 1897, 29 Stat. 599, codified as 43 U.S.C. §664, and repealed by the Federal Land Policy and Management Act of 1976, §706(a) 90 Stat. 2793. The Secretary of Interior had ruled that the 1891 Act did not apply to reservoir sites reserved under the 1888 and 1890 Acts, *supra.* (29 Cong. Rec. 1846, 1948 (1897)). Congress acted to correct this ruling by providing:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all

> reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way act of March third, eighteen hundred and ninety-one. Any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: Provided, that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

In these debates, the former Chairman of the House Committee on Public Lands, Congressman McRae of Arkansas, and Congressman Lacey, then Chairman, discussed the effect of the 1891 Act, and the history of events from 1888 to 1890. (29 Cong. Rec. 1948, 1955 (1897)). Based upon the following understanding of the 1891 Act, Congress extended it to the reservoir sites:

> In 1891 another law was passed, by which it was provided that all public reservations might be made use of by corporations, individuals, or associations for the purpose of constructing reservoirs and irrigating ditches. (29 Cong. Rec. 1846 (1897)). (remarks of Rep. Catchings).
>
> In 1891 it was further provided, in the right-of-way act for canals and reservoirs, that the waters of the arid regions might be utilized for the purpose of improving and cultivating

that country. (29 Cong. Rec. 1948 (1897)). (remarks of Rep. Lacey).

A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them. (Id.) (emphasis added).

Remember, *the United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States. (Id.,* p. 1949). (emphasis added).

In view of the language used in the right of way act of March 3, 1891, . . . the control of the States is expressly preserved. (*Id.* p. 1952). (emphasis added).

MR. COX: Well, if they do utilize these reservoirs, the water will be under the control of Congress as to the charges that shall be made.

MR. LACEY: No, the water does not belong to the Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois (Mr. Cannon) relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to

regulate and control the management and the price of the water. I ask the Chair to submit the question on the amendment. *(Id.)*[17]

MR. SHAFROTH: The amendment which has been proposed by the gentlemen from Illinois (Mr. Cannon), and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters. (*Id.*)

In the first instance, any person wishing to use these reservoirs under the right-of-way act must obtain from the State authority to impound the water of the streams from which it is proposed to bring these waters from irrigation. And under the constitution and laws of every State and Territory in the arid region the waters thus diverted for purposes of irrigation are absolutely under the control of the State. (29 Cong. Rec. 1954 (1897)). (remarks of Rep. Mondell).

. . . the general purpose of the bill is right and in line with the established policy adopted by Congress as to the right of way for canals and ditches through arid lands, and we must improve it by some kind of rational legislation for the location of necessary canals and ditches. We cannot expect these reservoir sites to remain dry and never to be used for

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17 The amendment referred to was proposed by Rep. Cannon, relating to state control of charges for water from reservoir sites.

> irrigating lands that are worthless without water; and since the Government does not intend to go into a general scheme of irrigation that would bankrupt the Government, it becomes necessary under proper legislation to authorize States and individuals to utilize the sites for the public good. (29 Cong. Rec. 1955 (1897)). (remarks of Rep. McRae).

In this discussion, Congressman Lacey and Shafroth made express reference to the rules and regulations promulgated under the 1891 Act and their interpretation by the Interior Department. Within a few months the Organic Administration Act of 1897 was passed. It too made reference to the rules and regulations promulgated under "the laws of the United States," providing in part:

> All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. (16 U.S.C. §481).

The only rules and regulations relating to the use of waters on forest reservations with which Congress was familiar in 1897 were those promulgated under the right of way provisions of the Act of March 3, 1891, which the Secretary of the Interior had construed to facilitate "(t)he control of the flow and use of the water . . . (as) a matter exclusively under State or Territorial Control. . . . " (18 Interior Dept. Decisions 168 (1894)).[18]

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[18] The United States reads §481 as "evinc(ing) a congressional intention not to leave the disposition of national forest waters entirely to state law." (Brief for the United States, p. 63, fn. 25). Such a reading blatantly ignores contemporaneous understanding. The United States' reliance on *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, is also ill-founded. *Rio Grande* stands for the proposition that the government can exempt waters from appropriation under state law in order to protect navigability. As regards the non-navigable waters in national forests to which Representative Lacey referred, *supra*, "the water is under control of the states." (20 Cong. Rec. 1949).

Shortly after the enactment of the Organic Administration Act of 1897, rules and regulations governing the forests were promulgated by the Secretary of Interior:

> 7. It is further provided, that — . . . All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder,
>
> * * * *
>
> 11. The right of way in and across forest reservations for irrigating canals, ditches, flumes and pipes, reservoirs, electric-power purposes, and for pipelines, will be subject to *existing laws and regulations*. (Department of Interior Circular of June 30, 1897, *Rules and Regulations Governing Forest Reserves Established Under §24 of the Act of March 3, 1891*, reprinted in H. Docs., 55th Cong., 2nd Sess., Vol. 12, 1897 Report of the Secretary of Interior, pp. cix. et. seq.). (emphasis added).

Regulations Nos. 8-10 relate to the matters addressed in the first two paragraphs of regulation No. 7, which immediately preceed the quoted water provision of Regulation No. 7. Accordingly, Regulation No. 11 is clearly interpretative of the water provision in Regulation No. 7. The Secretary of Interior thus read 16 U.S.C. §481 as referring to existing laws and regulations relating to rights of way within the forests, viz., the rules and regulations promulgated under §18 of the Act of March 3, 1891.

The Secretary of Interior prior to the transfer of forest administration in 1905, continued using unchanged the regulations for rights-of-way originally promulgated under the 1891 Act. (*1903 Compilation, supra,* pp. 14-17; Regulations of September 28, 1905, 34 Interior Dept. Decisions 212, 236, (1905); and of June 6, 1908, 36 Interior Dept. Decisions 567 (1907). In the 1906 Report of the Forester to the Secretary of Agriculture, (H. Exec. Docs. 59th Cong., 2nd Sess., Vol. 21, Report of the Secretary of Agriculture, No. 6, p. 267 (1906)), Gifford Pinchot states that the Forest Service began charging in that year for use of water, based upon lengths of ditches, acreage flooded, and use of advantageous locations, but that:

> The water itself is granted by the State, not the United States. (*Id.*, p. 273).

Finally, in the Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. §522, 43 U.S.C. §959, repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793, Congress provided for rights of way in national forests for water works of any sort, i.e., for "domestic, public or any other beneficial use. . . . " The act cured the situation that the original provision provided rights of way only for irrigation purposes while state control of waters was provided for any purpose. The difficulty was discussed in H. Rep. No. 1850, 56th Cong., 1st Sess. (1900):

> The result of the above-stated conflict of statutes has produced the anomaly that while forest reserves are being set aside to preserve watersheds and increase the water supply, the same legislation has denied its use in and for the industries calculated to be benefitted thereby. This bill corrects this condition by extending the opportunities to use the waters to mining, electrical, domestic, public and other beneficial uses.

The last relevant statute is the Forest Right-of-Way Act of 1905, 33 Stat. 628, 16 U.S.C. §524, now repealed by the Federal Land and Policy Management Act of 1976, §706(a), 90 Stat. 2793. This Act confirms the Secretary of the Interior's requirement that a state law water right is required in order to obtain federal rights of way through forest reserves by providing that rights of way are subject to the rules and regulations of the Secretary of Interior and must comport with the water laws of the State or Territory wherein the forest reserve is located.

In response to this legislative history, the United States naively asserts that "(t)he statutory purpose of 'securing favorable conditions of water flows' is defeated if the national forest has no reserved right to maintain" minimum instream flows. (Brief for the United States, p. 37). The United States ignores the fact that the forest reserves were designed to provide water to private appropriators, both within and below the forest watersheds:

> If the state law of prior appropriation allows upstream appropriators to withdraw the full contents of the stream, the United States . . . can only resort to eminent domain and buy the stream back. (*Id.*, p. 37).

The United States may have hit the nail on the head.

This history shows that in 1891 Congress provided that state law would control the allocation of waters within the national forests for private uses and that such uses could include reservoirs which would impound the flows of streams within the forests for use in irrigation. In 1894 the Secretary of the Interior concluded that state law controlled the flows of waters in the forests. Congress made reference to the Secretary's rules and regulations in passing the Organic Administration Act of 1897. Promptly thereafter, the Secretary of the Interior promulgated new regulations, making no changes in the regulations governing rights of way within the forests.

In two statutes after the 1897 Act Congress provided for broadened beneficial use of the waters of the forests by expanding the grants of right of way to accommodate use of water for any beneficial use. These acts authorized the use of works for diversion or impoundment of waters without restricting or limiting the effects of such diversions or impoundments upon downstream flows.[19] Based upon these laws substantial water rights vested under state law have been established by means of diversion within national forests that utilize entire stream flows. (cf., the *amici curiae* briefs of Twin Lakes Reservoir and Canal Company, the Southwestern Colorado Water Conservancy District, Phelps-Dodge, Inc., and Molycorp, Inc.). Such substantial diversions also include the municipal water works of many western towns and cities. See, e.g., the Act of June 6, 1900, 31 Stat. 657; Act of May 28, 1940, 54 Stat. 224, 16 U.S.C. §552 (a).

The reservation doctrine is based upon the legal fiction -- not in a pejorative sense -- that Congress implicitly reserved sufficient waters to satisfy the purposes for which lands are withdrawn from the public domain. Congressional intent is

19. The 1901 Act, 31 Stat. 790, allowed rights of way for "canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public or any other beneficial uses. . . ." The 1905 Act allowed rights of way for ". . . dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals . . ." within the forests. Dams, reserviors, and water plants are inconsistent with retained water rights for minimum in-stream flows because the physical works often involve the capture of all stream flows. The right of way Act of 1901 also allowed electrical plants, poles, etc., establishing the waters of the forest could be used for power generation. Under the technology of the day, the pressure head for power generation was achieved without damage to the plants by diverting the entire flow of streams into pipelines which utilized the falling levels of the mountain slopes. That mining uses would result in complete diversion of a stream's flows was recognized in *Jennison v. Kirk*, 98 U.S. (8 Otto) 453 (1878).

inferred. The United States asks the Court to infer an intent that flies in the face of congressional action. To adopt the position urged by the United States we must believe that the implicit expressions of Congress undermine its explicit ones.[20]

POINT V

RECREATION AND GRAZING WERE NOT AMONG THE AUTHORIZED PURPOSES FOR WHICH THE GILA NATIONAL FOREST LANDS WERE OR COULD HAVE BEEN WITHDRAWN FROM THE PUBLIC DOMAIN.

The essence of the United States' argument in support of its claims for reserved rights for recreation and stockwater uses is that people have historically used the forest lands for recreational purposes and cows have historically grazed there. From these two facts, however, the United States' conclusion does not follow.[21]

In discussing the "legislative and administrative background" the United States relies on selected passages from secondary sources and one inapposite statute:

20. When Congress sought to preserve water levels in streams within one national forest, it did so by statute, providing in 16 U.S.C. §577b:

> In order to preserve the shore lines, rapids, waterfalls, beaches, and other natural features of the region (parts of the Lake Superior National Forest) in an unmodified state of nature, no further alteration of the natural water level of any lake or stream . . . shall be authorized. . . .

21. The United States prefaces its argument by mocking the fact that a mistake was made in New Mexico's initial memorandum brief before the Special Master. (Brief for the United States, pp. 40-43). In argument before the district court, counsel for New Mexico openly requested leave to correct his mistake. The matters in question were thoroughly argued and briefed before the district court and the New Mexico Supreme Court.

The recreational purposes of the national forest were articulated throughout the period in which the national forests were first established. The 1890 Act creating the first forest reservations in California, specifically authorized the Secretary of the Interior to permit "the erection of buildings for the accommodation of visitors" and "the construction of roads and paths" through the forest. In addition, it instructed him to provide against the wanton destruction of the fish and game inside the forest, and against their taking "for purposes of merchandise or profit," and to protect all the "natural curiosities, or wonders within such reservation, * * * in their natural condition." 26 Stat. 651; see p. 32, *supra*. (Brief for the United States, p. 44).

The Act of October 1, 1890, to which the United States refers, created Yosemite National Park. In response to a question concerning the issuance of rights of way through the reserve, Justice VanDevanter, then an assistant attorney general, issued an opinion concluding that the water and rights of way provisions of the Acts of 1891 and 1897 had no application to the special legislation creating Yosemite National Park. (28 Interior Dept. Decisions 474 (1899). Yosemite was different.

As noted earlier, the Department of the Interior in 1893 and 1894 requested that similar language be inserted in the proposed forest legislation, including specific legislative instruction that the Secretary preserve "such wonders and curiosities and game as may be thereon . . . . " (H. Exec. Docs. 53rd Cong., 3rd Sess., Vol. 14, Report of the Secretary of the Interior, Vol. 1, pp. LXXIV-LXXV (1894)). The McRae bill

of 1896 contained such a provision. (28 Cong. Rec. 6410 (1896)). It was rejected.[22]

The United States' explanation in support of reserved rights for grazing is equally disingenuous. The provision of the 1897 Act requiring that "(a)ll waters on such reservations may be used . . . under the laws of the State wherein such forest reservations are situated," is again ignored. So is the history. During the passage of the Range Revegetation Act, Act of October 11, 1949, 63 Stat. 762, at 95 Cong. Rec. 13566 1949, Congressman Barrett referred to H. Rep. No. 2456, 80th Cong., 2nd Sess. (1948), and stated that grazing was not among the recognized uses of the forests under the 1897 Act. The report stated:

> Much of the present controversy . . . stems from *the omission in the basic Forest Act of 1897 of reference to grazing as among the*

22. The United States makes the same argument in its discussion of the legislative history of the 1897 Act, urging that "Congress provided for the systematic extension of the (natural wonder, game, and fish protection) concept of national forests that had begun with the 1890 legislation." (Brief for the United States, p. 32). The United States overlooks the pertinent history.

The rejection of the proposed language in the 1896 version of Secretarial powers of regulation of H.R. 119 should be contrasted to the purposes clause of the National Park Service Act of 1916, 39 Stat. 535, 16 U.S.C. §1(1970): the "fundamental purpose of said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." In H. Rep. No. 700, 65th Cong., 1st Sess. (1916), the Committee stated with respect to this law:

> In the national forests there must always be kept in mind as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people.

Compare the different treatment afforded the United States' claims for its national parks in the Water Division No. 5 proceedings in Colorado, See App. B. p. 128b.

> *recognized uses of the national forests and does not prescribe any policies for the administration of grazing as a function of the Forest Service. The Forest Act only provides for timber and watershed conservation. Other presently recognized uses such as recreation and wildlife are also omitted. (Id.,* p. 10). (emphasis added).

The Committee recommended:

> 1. *That the Forest Act be amended to provide that grazing, recreation, and wildlife be made basic uses of national forest land. (Id.,* p. 15). (emphasis added).

In the Act of 1897, the Congress provided:

> The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations . . . . ; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. (16 U.S.C. §480).[23]

Perhaps in tacit recognition of its untenable view of the legislative history of the Organic Administration Act of 1897, the United States has asserted, albeit inconsistently, that the reservation doctrine provides not only that amount of water

23. This language immediately precedes the water provision of the 1897 Act, 16 U.S.C. §481. The two were combined in the Senate version of H.R. 119 passed in 1895. (27 Cong. Rec. 2780 (1895)).

implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, but also provides whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees.[24] Reliance is placed on the authority the government derives from §478 of the Organic Administration Act to regulate "proper and lawful" uses of the forest lands.[25]

That the United States' logic is in error can be seen by its analysis of the case law dealing with its authority to regulate such activities. For example, in its brief on the subject in

24. The United States points out that hotels, stores, mills, summer residences, and similar establishments are allowed in our national forests. (Brief for the United States, p. 48). It is said that this reflects federal involvement in recreation and that Congress must have intended that sufficient water be reserved to permit these uses to continue. The United States appears to assume that if these waters are controlled by state law, the uses will not occur or that they may be impaired by other uses. Thus, the United States wishes to use the reserved rights doctrine to create a preferential class of in-forest uses for hotels, stores, mills, summer residences, ski resorts, and the like. It is not explained why all of the other "domestic, mining, milling, (and) irrigation" uses don't get the same treatment.

25. From the mere fact that the Secretary could regulate a use of the forests and the fact that the use requires water, it cannot be inferred that a federal water right is necessary for the purposes of the reserve. Contemporary regulations of the Secretary of Interior establish, for example, that grazing was allowed *only* if it did not interfere with water supply or state water rights. Grazing of sheep and goats was allowed in certain reserves, and only if ". . . the water supply of the people will not be adversely affected by the presence of sheep and goats within the reserve." Grazing of other livestock was allowed only ". . . so long as it appears that injury is not being done the forest growth and water supply and the rights of others are not thereby jeopardized." (Circular of December 23, 1901, reprinted in *1903 Compilation, supra,* p. 61). The fact that the Secretary regulated grazing shows the subjection of grazing use to protection of state water rights, not that waters were reserved from appropriation under state law to supply livestock needs. The regulations provided the livestock could not intrude upon reservoir water supply and that sheep and goats could not be allowed within 500 feet of any live spring or running stream. (*Id.,* 66, 70).

State of New Mexico, ex rel., S. E. Reynolds, State Engineer v. Molycorp, et. al., United States District Court for the District of New Mexico, Civil No. 9780, presently pending, the United States argued as follows:

> The opinion in *McMichael v. United States of America, supra,* considered the very issue now before this court. In that case appellants argued that certain regulations establishing a wilderness area limiting the use of portions of a National Forest were not authorized under the Organic Administration Act of June 4, 1897. In upholding the regulation as a valid forest purpose the court stated:
>
> > The consistent administrative interpretation of the Act of June 4, 1897, however, has been that while recreational considerations alone will not support the establishment of a National Forest, *they are appropriate subjects for regulation.* Congress has tacitly shown its approval of this interpretation by appropriating the sums required for its effectuation. (Emphasis added) (355 F.2d at 285).[26]

All the 9th Circuit was saying, of course, was that the Secretary of Agriculture has the authority under §478 of the Act to make rules and regulations governing the use of wilderness. The court did not conclude, as the United States does, that "the regulation is a valid forest purpose" out of which reservation water rights can arise in behalf of the forest

26. It should be noted that the conclusions of Special Master in federal district court are essentially the same as those of the New Mexico state courts in the case at bar.

administrators. This conclusion, we submit, is patently erroneous.

Section 551 of the Organic Administration Act reads as follows:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. (16 U.S.C. §551 (1975)).

According to the United States, "(o)bviously, 'occupancy and use' contemplate more than the two purposes identified by (New Mexico)." (Brief-in-Chief before the New Mexico Supreme Court, p. 13). "Obviously," of course, is legalese for the probability that the assertion it qualifies may not be correct, and such is the case here. From the fact that the Secretary of Agriculture is empowered to regulate the many *uses* of forest lands it does not follow that the *purposes* for which national forest lands can be reserved are somehow expanded. On the contrary, it was to preserve the objects or purposes of the forests as they were enumerated in §475 that the Secretary was authorized to regulate occupancy and use.

It will be recalled that the major deficiency of the Creative Act of 1891 was its failure to provide for the regulation of the forests once they were reserved, and it was largely for this reason that the Organic Administration Act of 1897 was passed. (Bassman, *The Organic Act of 1897: A Historical Perspective,*

supra; "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," *supra*). Section 551 was intended to remedy this deficiency. In order to insure that the purposes of watershed protection and timber preservation were not undermined or interferred with by the unrelated, but lawful activities in the forests, those activities had to regulated: ". . . any person (may enter) upon such national forests for all proper and lawful purposes . . . . (provided that such persons) must comply with the rules and regulations" adopted under §551. (16 U.S.C. §478). Accordingly, §551 was designed to regulare forest *uses,* and not to somehow equate forest uses with forest *purposes.* If we can draw any conclusion from the fact that §551 was included in the Act, it is that Congress was aware that many of the uses made of forest lands by private individuals might be inconsistent with the purposes for which the forests were created.

The cases which have dealt with 16 U.S.C. §551 support this conclusion. For example, in *United States v. Grimaud,* 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land. The Court first noted the purposes for which the forests were created:

> From the various acts relating to the establishment and management of forest reservations, it appears that they were intended to improve and protect the forest and to secure favorable conditions of water flows.

The Court then noted the regulatory power provided to the Secretary by §551 and went on to say:

> Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at the season of the year, might not be so at another. (emphasis added)

In this light it is apparent that the United States' argument is in error. *Grimaud,* in the government's analysis, stands for the proposition that "the use of the national forests for grazing was determined to be a lawful purpose pursuant to the terms of the Organic Act." (Brief-in-Chief before the New Mexico Supreme Court, p. 27). It is clear, however, that §551 exists to regulate forest *uses* "inconsistent" with forest *purposes.* (See also, *Light v. United States,* 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Hunt,* 19 F.2d 634 (9th Cir. 1927); *United States v. Johnston,* 38 F. Supp. 4 (D.W. Va. 1941) and *United States v. Shannon,* 151 Fed. 863 (D. Mont. 1907); *United States v. Hymans,* 463 F.2d 615 (10th Cir. 1972); *McMichael v. United States,* 335 F.2d 283 (9th Cir. 1965); *United States v. Reeves,* 39 F. Supp. 580 (W.D. Ark. 1941)).

Instead of supporting the contentions of the United States, the cases clearly indicate that §§478 and 551 in no way expand the purposes for which forest lands can be withdrawn under §475. The Secretary may regulate skinny-dipping in the forests if it would preserve the interest of the public. *United*

States v. Hymans, supra. This does not compel the conclusion that every such regulated use or activity rises to the level of a forest purpose. The purposes for which national forest lands can be withdrawn are limited to those expressed in the Organic Act.

The argument that the United States has reserved water rights based upon the regulatory authority of the Secretary in § 551 also ignores the provision § 481 that "(a)ll waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated." If the power to regulate had entailed a power to reserve waters for the regulated uses, the Secretary would have been mistaken in his repeated expressions between 1894 and 1908 that only the states had the authority to regulate the flow and use of water. Congress would have been wrong, as well.

The United States confuses land use regulation with water use regulation. In the Acts of 1891, 1897, 1901, and 1905, the Secretary was given regulatory control over the siting and location of water diversion works in order to prevent interference with governmental occupation of the reserves. At the same time Congress expressly provided that the states should control the water. To now infer an unspoken and dormant intent that Congress did otherwise would be less than scholarly.[27]

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27. The United States believes that the holding of the New Mexico Supreme Court would preclude "the United States from freely transfer(ing) stockwatering rights; rather, on any transfer of grazing rights, the new permittee would be forced to establish his own right." (Brief for the United States, p. 43). It is also urged that the "ruling that the Forest Service permittees must acquire their own rights to the use of forest water for stockwatering purposes would impede federal range management on the national forests." (*Id.*, p. 62). Both views are incorrect. The district court concluded:

> That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, *the water rights arising therefrom* should be adjudicated to the permittee under the law of prior appropriation and not to the United States. (Conclusion No. 9, A. 230, emphasis added).

The court's conclusion was fashioned the way it is because the United States did not discriminate between federal uses and private uses in its water rights inventory, which became the basis of the list to which the court referred. Under New Mexico law *no water rights arise* for the kind of stock watering or grazing listed. Consequently there is nothing to adjudicate. No "transfers" are needed, and no burden is created. The principle remains, however, that the United States does not enjoy federal reserved rights for private uses.

POINT VI

THE MULTIPLE-USE SUSTAINED YIELD ACT OF JUNE 12, 1960, DID NOT REWRITE HISTORY.

The Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528 *et. seq.*, provides in pertinent part:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in (the Organic Act of 1897). (§ 528).

The United States argues that by this provision "Congress gave explicit recognition to the traditional use of national forests for outdoor recreation and other secondary purposes." (Brief for the United States, p. 53). In the Water Division No. 5 proceedings in Colorado the United States asserted that the Act was a "reaffirmation and codification" of the administrative policy of the Secretary of Agriculture. Before the Idaho Supreme Court it was contended that the Act "ratified" the

additional purposes of recreation, aesthetics, and fish and wildlife preservation. (See App. B, p. 99b). According to the United States the Act legitimizes its claims.

As noted by the New Mexico Supreme Court, a similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz,* 522 F.2d 945 (4th Cir. 1975):

> In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in Morton v. Mancari, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):
>
> > "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

> "The purposes of this Act are declared to supplemental to, but not in derogation of, the purpose for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. §475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to

> the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.
>
> . . . .
>
> (F)rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent (sic) to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service. . . . (522 F.2nd at 953-54).

Congress shared this view. Pursuant to H.R. Res. No. 93, 80th Cong., 1st Sess. (1947), the House Committee on Public Lands and the Subcommittee on Forest Service Policy and Public Lands conducted extensive hearings. The Committee said:

> The basic purpose underlying the creation of our national forests was the protection of our timber resources and watersheds. (H. Rep. No. 2456, 80th Cong., 2nd Sess., p. 10 (1948)).

Congress had not changed its mind in 1960:

> The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of

timber as set out in the cited provision of the act of June 4, 1897. *Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest (*under the 1960 Act) *if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.* H. Rep. No. 1551, 86th Cong., 2nd Sess., p, 4 (1960). (emphasis added).

There is nothing wrong with the management of national forests under the principle of multiple use. But in 1960 Congress did not change what it did in 1897.

CONCLUSION

We should respond to the impression created by the United States that the national forests will be jeopardized if its claims are not recognized. Implied throughout is the notion that the state wishes to deny water to the forests. This is inaccurate and misleading. It suggests that the state has little regard for the preservation of the forests within its borders.

Common sense should prove that this is not true. So should the fact that the Gila National Forest and others within the boundaries of the state continue to exist -- very much alive, serene and beautiful.

If the judgment of the New Mexico Supreme Court -- recently joined by the judgment of the Idaho Supreme Court -- is upheld, the adjudication of the United States' claims will

continue as a matter of course. Pursuant to the decision of the New Mexico Supreme Court the Gila National Forest can continue to be improved and protected.

The judgment should be affirmed.

Respectfully submitted,

TONEY ANAYA
Attorney General of
New Mexico
RICHARD A. SIMMS
Special Assistant Attorney General
PETER THOMAS WHITE
Special Assistant Attorney General
DON KLEIN
Special Assistant Attorney General
JAY F. STEIN
Law Clerk

State Engineer Office
Bataan Memorial Building
Santa Fe, New Mexico 87503

APPENDIX A

STATUTES INVOLVED

1. Act of July 26, 1866, Ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661:[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States . . .

. . . . Sec. 9. ***And be it further enacted,*** That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

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1. The text of both the 1866 and 1870 Acts was amended by The Federal Land Policy and Management Act of 1976, P.L. 94-579 § 706(a), 90 Stat. 2793, to omit the provisions of the two laws respecting rights of way. The provisions of the two laws respecting water rights were retained, in accordance with § 701(g) (1) and (2), which provide at 90 Stat. 2786, 43 U.S.C. 1701:

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or –

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; . . . .

2. Act of July 9, 1870, Ch. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52:[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act. . . .

. . . Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. . . .

3. Desert Lands Act of 1877, Ch. 107 § 1, 19 Stat. 377, 43 U.S.C. § 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . . that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all,

lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

4. Act of September 2, 1888, 25 Stat. 526, 43 U.S.C. § 662 as amended, the Sundry Civil Appropriations Act for 1889, contained the following provision in the appropriation provisions for the United States Geological Survey:[2]

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employes in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars, or so much thereof as may be necessary. And the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a report to Congress, on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs,

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2. These provisions of the Act of September 2, 1888, and of 43 U.S.C. § 662 were repealed by § 704(a) of the Federal Land Policy Management Act of 1976, 90 Stat. 2792.

ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject, after the passage of this act, to entry, settlement or occupation until further provided by law: *Provided,* That the President may at any time, in his discretion, by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

4. This provision was amended by the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 662, the Sundry Civil Appropriations Act for 1891, as follows:[2]

For topographic surveys in various portions of the United States, $325,000, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October 2, 1888, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1889, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or

settlement is validated by this act: *Provided,* That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

5. Act of March 3, 1891, Ch. 562 §§ 17, 18-21,24,26 Stat. 1095.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs: excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs. . . . [This language appears as 43 U.S.C. § 663.]

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof: also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided,* That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such

reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of

this act from the date of their filing, as though filed under it: *Provided,* That is any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch. [These provisions as amended are codified as 43 U.S.C. 946-949.][3]

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. [This section is codified as amended as 16 U.S.C. §471, termed the Creative Act.][4]

6. The Organic Administration Act of June 4, 1897, Ch. 251, 30 Stat. 34-36:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, for

3. Sections 18-21 of the Act of March 3, 1891, as amended, were repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793.

4. This section was repealed by the Federal Land Policy and Management Act of 1976, §704(a), 90 Stat. 2792.

the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, namely:

* * * *

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: *Provided*, That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: (16 U.S.C. §473) *Provided*, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may

hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. [16 U.S.C. §475.]

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States. [16 U.S.C. §551].

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each

purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises. [16 U.S.C. §476.][5]

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers,

5. This section was repealed by the National Forest Management Act of 1976, Act of October 22, 1976, 90 Stat. 2949, 2958.

miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located. [16 U.S.C. §477.]

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided,* That such persons comply with the rules and regulations covering such forest reservations. [16 U.S.C. §478.]

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further,* That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (Not codified.)[6]

6. The Forest land in-lieu selection provisions of the 1897 Act were amended and repealed within the first decade of the 20th century.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church. [16 U.S.C. §479.]

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. [16 U.S.C. §480.]

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. [16 U.S.C. §481.]

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations

applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. [16 U.S.C. §482.]

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve. [16 U.S.C. §473.]

7. Act of February 15, 1901, Ch. 372, 31 Stat. 790, 16 U.S.C. 522, 43 U.S.C. 959:[7]

Be it enacted by the Senate and House of Representatives of the States of America in Congress assembled, That the Secretary Interior be, and hereby is, authorized and empowered, under regulations to be fixed by him, to permit the use of rights through the public lands, forest and other reservations of the States, and the Yosemite, Sequoia, and General Grant national [parks of, *sic*] California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any

7. This provision was repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793.

citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

8. Act of February 1, 1905, Ch. 288 § 4, 33 Stat. 628, 16 U.S.C. § 524:[8]

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

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8. This provision was repealed by the Federal Land Policy and Management Act of 1976, § 706(a), 90 Stat. 2793.

9. Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be contrued so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various

renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

IN AND FOR THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,	)	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 4 W-425 through W-438
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,	)	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 W-467 and W-469
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,	)	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 6 W-85 and W-86
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 36, IRRIGATION DIVISION NO. 5,	)	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF SUMMIT CIVIL ACTION 2371
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37, IRRIGATION DIVISION NO. 5,	)	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE CIVIL ACTION 1529
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 51, IRRIGIATION DIVISION NO. 5,	)	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF GRAND CIVIL ACTION 1768
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 52, IRRIGATION DIVISION NO. 5,	)	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE CIVIL ACTION 1548

PARTIAL MASTER-REFEREE REPORT COVERING ALL OF THE CLAIMS OF THE UNITED STATES OF AMERICA

(pp. VI-IX, Vol. 1, Partial Master-Referee Report Covering All of the Claims of the United States of America.)

V. MEMORANDUM OPINION CONCERNING RESERVED RIGHTS.

The Master-Referee believes that the submission of naked findings of fact and conclusions of law would fail to do justice to the resolution of the important, novel, and complex issues involved in this litigation. While simply making such findings and conclusions would indeed resolve the issues presented, it would do little to explain the rationale of the Master-Referee's determinations and perhaps even less to aid those Courts which may be called upon to review these proceedings. Consequently, the Master-Referee precedes his findings of fact, conclusions of law, and proposed decree with the following memorandum opinion on the reserved right claims of the United States.

A. Definition of the Term "Reserved Rights."

Prior to beginning any discussion of the concept of federal "reserved rights," it is essential to define or describe the term. Since the term represents a concept which has been developed solely by judicial decision, it is necessary to examine the case law regarding reserved rights to develop an adequate definition.

1. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899).

The case most frequently cited as the basis of the reserved right doctrine is *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899). In that case, the United States was seeking to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico and thereby appropriating waters for irrigation and other pur-

poses. In discussing whether a state is empowered to change the common-law riparian system of water rights and permit the adoption of the appropriative system, the Court said:

> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be reconized: *First, that, in the absence of specific authority from congress, a state cannot, by it legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.*" (emphasis added)

That the United States possessed rights to the continued flow of water on its land was thus established.

2. *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908).

The actual form of this right of continued flow, at least as it applies to federal reservations, was elucidated in *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908), the first case to address directly the issue of reserved rights. The reservation in question in *Winters* was a Montana Indian reservation which was established in 1888. In 1889 and without complying with Montana law, the United States diverted 1,000 miners' inches of water from a stream bordering the reservation for use on the reservation. When later appropriations impaired the government's diversion, the United States sued to restrain them. The Supreme Court upheld the restraining order on the theory that the United States had intended in 1888 to reserve not only land but also water, the use of which could not be impaired by the subsequently-appropriating defendants. The Court said:

> "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 702, 43 L. 3d. 1141, 19 Sup. Ct. Rep. 770; *United States v. Winens*, 198 U.S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The Court found that without such a reservation of waters the purpose of the reservation, the transformation of the Indians from a nomadic to a pastoral people, could not be achieved. The United States was thus awarded 1,000 miners' inches in this first case dealing directly with the reserved right doctrine.

3. *United States v. Powers*, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939).

The doctrine of federal reserved rights appurtenant to Indian reservations was reaffirmed by the Supreme Court in 1939 in *United States v. Powers*, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939), and by numerous lower federal court decisions as well. *United States v. Ahtanum Irr. Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. den.*, 352 U.S. 988 (1957); *United States v. Walker River Irr. Dist.*, 104 F. 2d 334 (9th Cir. 1939); *United States v. McIntire*, 101 F. 2d 650 (9th Cir. 1939); *United States v. Hibner*, 27

F. 2d 909 (D.C. Ida. 1928); and *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D.C. Mont. 1968). *See also, United States v. Cappaert,* 508 F. 2d 313 (9th Cir. 1974), *aff'd, U.S.* (June 7, 1976) (44 R.W. 4756), regarding reserved rights in national monuments.

4. *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

The next United States Supreme Court case to address the reserved rights issue was *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963). It was by that decision that the Supreme Court first clearly expanded the doctrine of reserved rights to include non-Indian federal withdrawals and reservations while also reaffirming the doctrine's applicability to Indian reservations. Regarding reserved rights claimed on behalf of the five Indian reservations in question, the Supreme Court upheld the findings of the Master that:

1. The United States had, as a matter of fact and law, intended to reserve waters as well as lands;
2. The United States had reserved an amount of water sufficient to irrigate all the practicably irrigable acreage on the reservation. The Court specifically approved the rationale of *Winters* in finding that water was necessary to the establishment of "civilized communities" on the reservation — the main objective of the reservation system.

After upholding the Master's conclusions regarding Indian reservations, the Supreme Court went on to support

his extension of the reservation doctrine to other classes of federal reservations. The Court stated:

> "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."

The amount of water available to each of these non-Indian reservations was more specifically established in the decree of the Court wherein each of the reservations was awarded a sufficient quantity of water as was reasonably necessary to fulfill its purposes. *Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

5. *United States v. District Court in and for County of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971); *United States v. District Court in and for Water Division No. 5, Colorado,* 401 U.S. 527, 91 Sup. Ct. 1003, 28 L. Ed. 2d 284 (1971).

The next occasion for a discussion of the reserved right doctrine was the Court's decisions in the companion opinions of *United States v. District Court in and for County of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971), and *United States v. District Court in*

and for Water Division No. 5, Colorado, 401 U.S. 527, 91 Sup. Ct. 1003, 28 L. Ed. 2d 284 (1971) [hereinafter *Eagle County* cases], which were handed down in an earlier stage of this litigation. Both opinions involved the United States' claims for reserved water rights on the various non-Indian federal reservations in the State of Colorado which are at issue here. The decisions, however, focused on the question of the *jurisdiction* of the state courts of Colorado to adjudicate the reserved rights of the United States rather than on the merits of its claims as must be done in this litigation. As is evident from the very existence of this partial report, the Supreme Court found that, under 43 U.S.C. §666, the McCarran Amendment, the Colorado courts did have the jurisdiction to adjudicate the government's claims.

Despite the procedural focus of the two opinions, the Supreme Court did make several statements more helpful to a better understanding of non-Indian reserved rights than is provided by *Arizona v. California* alone. Regarding the power of the United States to reserve waters, the Court in *Eagle County* noted:

> "It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.,* at 597, 83 S. Ct. at 1496. The federally reserved lands include any federal enclave."

As in the case of reserved rights on Indian reservations, the Court indicated that waters may be reserved to achieve the objectives of a non-Indian reservation: "The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave."

Both of these statements appear to be entirely consistent with the reserved right doctrine as developed by the Court in the Indian land cases and as more specifically defined in the decree in *Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

6. *Cappaert v. United States,* _____ *U.S.* _____, (June 7, 1976) (44 L.W. 4756).

The most recent statement of the Supreme Court regarding the reservation doctrine was delivered on June 7, 1976, in *Cappaert v. United States,* _____ *U.S.* _____, (June 7, 1976) (44 L. W. 4756). The decision dealt with the reserved rights of the United States appurtenant to the Devil's Hole National Monument. The Cappaerts were the owners of a large ranch bordering the Monument. In the operation of the ranch, the Cappaerts, subsequent to the establishment of the Monument in 1952, began withdrawals of underground water for use on their ranch. As a result of the Cappaert's withdrawals, the level of the water in the Devil's Hole National Monument began to drop below that level necessary to insure the survival of the Devil's Hole pupfish, a species found only in Devil's Hole and which the Monument had been created to protect. The United States successfully sought to enjoin the diversions by the Cappaerts to the extent necessary to maintain the pupfish. The Supreme Court affirmed the grant of that injunction.

The Court clearly reaffirmed the reserved right doctrine

and assured its applicability to all forms of federal reservations when it stated:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, §8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, §3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams."

The Court noted that water will be considered reserved only when the United States intended to do so, and that such intent may be implied if previously unappropriated waters are necessary to accomplish the purposes of the reservation . Indeed, the Court found that, in *Cappaert,* the reservation was express. The Court did caution, however, that only such waters as are necessary to fulfill the purposes of a particular reservation could be reserved. In Cappaert, it was found that water sufficient to assure survival of the pupfish had been reserved when the Monument was created in 1952. Therefore, it upheld the enjoinder of the Cappaerts' diversions, but only to the extent necessary to maintain the level of water required for pupfish survival.

7. *Priority of Reserved Right Determined through Comparison of Reservation Date with Appropriation Dates of Competing Uses.*

It is important to understand that in Colorado there is a great difference between a date of appropriation and a water right's priority or priority date. The appropriation date is the day that the appropriation was begun, regardless of when some court eventually issues a decree granting a priority to that appropriation (water right). The priority or priority date, on the other hand, is the *later* of two dates: the date of appropriation or, under present law, the year in which the application for a decree was filed with the water court (or, under prior law, the junior-most priority date awarded in previous adjudications). For example, this means that a water right having an appropriation date of 1879, but actually receiving no decree until 1976, will be senior to every reserved right involved in this litigation. On the other hand, a water right having an appropriation date of 1910 and receiving a decree in 1911, will be junior to the vast majority of reserved rights in this litigation.

With the exception of the last few lines of §37-92-306, C.R.S. 1973, the present Colorado statute does not carefully preserve the distinction between "appropriation" and "priority" dates. Unlike the practicing water bar and the few lines cited above, the statutes seem to use the term "priority date" synonymously with "appropriation date," §37-92-305(1), C.R.S. 1973. Since the two

cited statutory sections are in conflict over the terms' meanings, the Master-Referee has chosen to preserve the distinction which he and the practicing bar have maintained. It does appear, however, that the statute uses the word "priority," as opposed to "priority date," to describe relative seniority of water rights. §37-92-103(10), C.R.S. 1973. Consequently, where the term "priority date" appears in other portions of this report, the word "priority" may be substituted by the reader for his or her administrative or judicial convenience.

8. ***Reserved Right Is a Right to Use, and Not the Title to, Water.***

A review of the court decisions which discuss reserved rights discloses language which seems to indicate that the United States reserved the *ownership* of enough water to fulfill the purposes of various land reservations. For example, in *Winters,* 207 U.S. at 577, the Court states that "[t]he power of the Government to reserve *the waters* and exempt them from appropriation under the state laws is not denied, and could not be." (emphasis added) Such early references to reserved rights in terms of ownership of the water is not surprising; the concept is based upon federal ownership public lands under Article IV of the federal Constitution. At one time, of course, the United States owned nearly all of the lands of Colorado and the waters appurtenant thereto.

Colorado, and most other dry western states, subsequently established a system of appropriation for the allocation of water resources within the state. A water right in Colorado, as in all other appropriation states, is simply the right to *use* (not the ownership of) water under

certain conditions. Under Colorado's priority system, those conditions are fairly clearcut: one may use a specific quantity of available water if he has the necessary priority to do so. If another user has a more senior priority, the junior user must wait until the senior user's right to use the water has been fully satisfied. *Colorado River Water Conser. Dist. v. United States,* _____*U.S.*_____, 96 Sup. Ct. 1236, _____L. Ed. 2d_____(1976); Colorado Constitution, Art. XVI, section 6; *Coffin v. Left Hand Ditch Co.,* 6 Colo. 443 (1883).

Accordingly, this Court has no jurisdiction other than to assign priorities to specific uses of water, a process known as adjudication of water rights. *See* §37-92-301 *et seq.,* C.R.S. 1973. Consequently, it has no power to recognize the title of any claimant to any corpus of water. *Crippen v. White,* 28 Colo. 298, 64 P. 184 (1901).

As a result this Court has jurisdiction only to recognize the validity of the federal claims to reserved rights and to assign priorities to those rights. This means that a reserved right in Colorado is simply the right of the United States to use certain amounts of water for specific purposes. This means that, if the United States should elect not to use the water, a user with a more junior priority would be free to use the same water for his own purposes.

The more recent federal Supreme Court opinions recognize that a reserved right in an appropriation state can be nothing more than a right to the use of water. *Arizona v. California,* 373 U.S. at 595: "In these proceedings, the United States has asserted claims to waters . . . for use on Indian Reservations." And at 596:

"The Master found both as a matter of fact

> and law that when the United States created these reservations . . . it reserved . . . *the use* of enough water to irrigate the irrigable portions of the reserved lands." (emphasis added)

The Court later agrees with this finding of the Master. In the *Eagle County* cases, 401 U.S. at 524, the Court said, "we deal with an all-inclusive statute concerning the adjudication of rights to the use of waters of a river system," and in *Colorado River Water Cons. Dist.*, 96 Sup. Ct. at 1240, the Court repeatedly refers to reserved rights as federal "water rights," while describing water rights under Colorado law as a right to the use of water.

9. *Conclusion.*

The above cases and discussion of Colorado law permit the extrapolation of a workable, if broadly based, definition of the federal reserved right doctrine. It can be authoritatively stated that:

1. The United States has the power to reserve certain unappropriated waters appurtenant to any federal reservation or withdrawal from the public domain.

2. Whether the United States actually intended to exercise that power by reserving water in any such instance is a matter of fact to be determined in connection with specific claims of the United States.

3. The intent of the United States to reserve water may be implied by the actions and circumstances surrounding a particular reservation.

4. Any such reserved right exists only to serve the purposes of the reservation and water may be utilized only on the reservation to effectuate the purposes for which it was created.

5. The reserved right appurtenant to any federal reservation is for that quantity of water which is reasonably necessary to fulfill the purposes of the reservation.

6. Within an appropriation system, the date of priority of a particular reserved water right is the date of the reservation.

7. Any reserved right in Colorado is subject to water rights under Colorado law for which *appropriations* were initiated before the date of the reservation on which the reserved right is based.

8. A reserved right in Colorado is, as is any Colorado water right, the right to *use* water in priority when it is naturally or physically available. In other words, a reserved right is the legal basis for a priority to the use of a certain amount of water — it is not the title to any physical corpus of water.

These broadly stated extrapolations establish the parameters of the federal reserved rights doctrine. In large measure, the remainder of this opinion will be concerned with applying these basic elements to the reserved rights claimed in these matters.

B. The Existence of Reserved Rights in Colorado.

A major and important issue to be decided in these matters is whether reserved rights can exist at all in Colorado. Several objectors have argued that the United States has long since relinquished, as a matter of law and of fact, any

claims it may have once had to reserved water rights for lands in this state. The United States, of course, contends that it has never so relinquished its rights and that it has the power ro reserve water in Colorado just as it does in any public domain state. These contentions present the initial issue which must be decided herein.

1. *Stockman v. Leddy, 55 Colo. 24,*
129 P. 220 (1912) - - The Compact Argument.

The objectors argue that the decision of the Colorado Supreme Court in *Stockman v. Leddy,* 55 Colo. 24, 129 P. 220 (1912), and Article 16, sections 5 and 6, of the Colorado Constitution, prohibit, as a matter of law, the establishment of federal reserved water rights in Colorado. The Master-Referee does not agree.

a. *Rationale of the Objectors.*

Article 16, section 5 of the Colorado Constitution provides:

> "Water of streams public property. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

Article 16, section 6 states in pertinent part:

> "Diverting unappropriated water — priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. . . ."

The Constitution of Colorado contained both of these

provisions at the time it was prepared under the Congressional enabling legislation and submitted to the President prior to his proclamation admitting Colorado to statehood. Pres. Proc. of August 1, 1876.*See, United States v. District Court in and for County of Eagle,* 169 Colo. 555, 458 P. 2d 760 (1969), *aff'd* 401 U.S. 520 (1971).

In *Stockman v. Leddy, supra,* The Colorado Supreme Court discussed the effect of these provisions as they relate to the ownership of the waters of the state:

> "From the very beginning of the settlement in Colorado territory, and in other arid regions of the West, irrigation has been recognized by federal and state legislation, by the decision of the federal and state courts, and by the people directly interested, as the delared public policy. These decisions need not be cited. They are abundant. In section 5 of article 16 of our state constitution as originally adopted, this public policy is thus tersely expressed: 'The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.' Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the constitution, and declares for all time the public policy of this state which

theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier session of our general assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use. The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. *The property right, however, in the natural streams, and waters flowing therein, has never been renouced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use.*

This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the

topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, non-navigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. *When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity.* We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its

> sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty." (emphasis supplied)

The objectors contend that *Stockman* establishes state ownership of all waters within the boundaries of the state. They contend that the United States has recognized and agreed to Colorado's ownership of the waters within its boundaries as described in *Stockman* and that there can therefore exist no reserved rights in Colorado post-dating its admission to the Union.

The importance of *Stockman* is underscored by the statement of the Colorado Supreme Court in *United States v. District Court in and for County of Eagle:*

> "We do say at this time that, except for Stockman v. Leddy, *supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound."

The Master-Referee is of the opinion that *Stockman* does not prohibit the establishment of federal reserved rights in Colorado as a matter of law and that it therefore need not be overruled prior to consideration of the claims of the United States.

b. *Discussion of Stockman v. Leddy.*

Stockman v. Leddy was a mandamus action against the state auditor to compel him to issue a warrant to

Stockman for services rendered to a joint legislative committee. The state auditor defended his refusal by contending that the statute under which Stockman was making his claim was unconstitutional. To the Court, the determination of the statute's constitutionality was the principal purpose of the action.

The statute in question in *Stockman v. Leddy* provided for the creation of a joint legislative committee to:

> ". . . investigate the acts and claims of the Interior Department, the Reclamation Service, and the Forest Service of the Federal Government, and to ascertain whether or not the right of this state to control the distribution of the waters thereof within its borders is thereby in any way unlawfully limited or interefered with or infringed upon, or about to be interfered with or infringed upon; to investigate and determine what claims are made by or upon behalf of any state or corporation or individual thereof to the waters of any stream or streams originating in or flowing in the state of Colorado to the detriment of the interests of this state and the citizens thereof or the appropriators and users of said waters; and to examine into all matters by which the state's right to control the waters thereof may be affected."

A sum of $50,000.00 was appropriated to be used at the disposal of the committee. Stockman's claim for services rendered was to be paid from this appropriation.

After finding that the state auditor had standing to

challenge the constitutionality of the statute, the Court defined the issues for decision. They were stated as:

> "First, may the general assembly, out of the public revenues, appropriate money for the purpose of protecting or defending its rights, or those of its citizens, in the waters of the natural streams of the state; and, seccond, can the appropriation in this act be upheld, or is it in contravention of our constitution, as an attempt by the general assembly to confer purely executive power on a body or committee composed entirely of its own members?"

It was in response to the first issue that the Court made the lengthy statement cited above. On the basis of that analysis, the Court answered the first issue affirmatively. State ownership of water was an interest which the legislature had a duty to protect.

In response to the second issue, the Court found the statute unconstitutional. The Court noted that the investigation of the legislative committee was not intended to be a basis for future legislative action. The Court agreed that the legislature could authorize such an investigation and appropriate necessary funds for it. What the Court found unconstitutional, however, was the fact the members of the legislature were called upon to execute the law. This, the Court said, was violative of Article III of the Colorado Constitution providing for the separation of governmental powers. On this basis alone the mandamus action was rejected.

c. *Inapplicability of Stockman as Precedent in this Litigation.*

After carefully reviewing *Stockman v. Leddy,* the Master-Referee concludes that the language relied upon by the objectors is mere dictum or, in the alternative, that the existence of reserved rights was not at issue in that opinion.

It is the opinion of the Master-Referee that the decision in *Stockman v. Leddy* is distinguishable from the litigation at hand and does not dispose of the issue of whether the United States may claim reserved rights in Colorado.

[1.] *The Stockman Language Regarding State Water Ownership Is Mere Dictum and Not Binding Herein.*

The lengthy discussion of state ownership of water rights which the *Stockman* court made in responding to the first issue of that case was purely dictum and of no value as precedent. Language which is not the basis of a decision is dictum and is in no sense authority on the proposition addressed by such language. *Wheeler v. Wilkins,* 98 Colo. 568, 58 P.2d 1223 [1936]; *Young v. People,* 54 Colo. 293, 130 P. 1011 [1913]. Discussions of questions not directly involved in an opinion must be considered to represent only the views of its author. *Twilley v. Durkee,* 72 Colo. 444, 211 P. 668 [1922].

The *Stockman* language cited above and by the objectors was not a basis of the decision therein and is therefore dictum and not binding on the Master-Referee in these matters. *Stockman* was a mandamus action in which the issue was the validity of a warrant. The court denied the request for mandamus on the *sole* basis that the warrant had been issued pursuant to an appropriation which violated Article III of the Constitution. The lengthy discussion outlining the state's ownership of the water within its boundaries was wholly extraneous to the

ultimate decision to deny mandamus relief. Indeed, the Court addressed the ownership question only in relation to its first issue. In doing so, it made a preliminary finding that the appropriation was in fact valid. In no way can that determination be labeled a basis of the Court's decision to deny mandamus relief due to the invalidity of the appropriation. To accept this dictum and to consider it as precedent in this litigation would be inappropriate since *Stockman* involved issues entirely alien to this litigation.

(2) *Reserved Rights Exist as an Exception to Complete State Water Ownership.*

Even if the *Stockman* language regarding ownership of water were not dictum, the language must be evaluated in light of the matters actually at issue in *Stockman* as contrasted with the issues in this litigation. The instant litigation squarely addresses the existence of reserved rights in Colorado. The *Stockman* decision did not concern reserved rights in any way and did not address their existence, even in dictum. In light of the many cases prior and subsequent to *Stockman* which have unqualifiedly upheld the right of the federal government to reserve waters, the Master-Referee is of the opinion that the only reasonable interpretation of *Stockman* is that reserved rights were not addressed by the Court and must necessarily exist as an implied exception to any rules which *Stockman* may have established. *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 [1908]; *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L Ed. 2d 542 [1963]; *United States v. District Court in and for County of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 [1971]; *Cappaert v. United States,* _____ U.S. _____, [June 7, 1976] [44 L.W. 4736]. Such an interpretation does no violence to the rationale of *Stockman,* as the state

of Colorado must still be considered to be the owner of all *unreserved* waters. If the interest of the state in protecting and regulating the waters within its boundaries derives from ownership thereof, as *Stockman* would indicate, its interest is in no way diminished by recognizing federal reserved rights since administration of those federal rights is a matter left to the state by the McCarran Amendment.

The Master-Referee believes that this interpretation of *Stockman* is the only one permissible in light of the decision of the United States Supreme Court in *United States v. District Court and and for County of Eagle, Colorado, supra.* There the Court appeared to be addressing the comments of the Colorado Supreme Court regarding *Stockman* in its *Eagle County* opinion when it said:

> "It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. *As we said in Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Federal government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id.*, at 597, 83 S.Ct. at 1496. The federally reserved lands include any federal enclave." [emphasis supplied]

Whatever application *Stockman* may have had prior to this pronouncement of the United States Supreme Court, it must be limited accordingly. By simply excepting reserved waters from the ambit of the *Stockman* language, the above-cited language can be reconciled with subsequent decisions.

The Master-Referee notes that there is support for this

interpretation in analogous law. In *Federal Power Commission v. Oregon,* 349 U.S. 435, 75 Sup. Ct. 832, 99 L. Ed 1215 [1955], the Supreme Court addressed the issue of the applicability of the Desert Land Act of 1877 and related Acts of 1866 and 1870 to federal reserved lands in California. In *California Oregon Power Co. V. Beaver Portland Cement Co.,* 295 U.S. 142, 55 Sup. Ct. 725, 79 L. Ed. 1356 [1935], those acts had been held to have severed all non-navigable waters from the public domain, leaving them open to public use *under the laws of the various states.* In the *Federal Power Commission* decision the Court limited that holding by excluding its applicability to federal reserved lands. In this case, the holding of *Stockman,* so far as it applies to bar assertion of the claims of the United States, must be similarly limited by excluding therefrom waters reserved by the federal government.

The inescapable conclusion reached by an analysis of *Stockman* and the many decisions of the United States Supreme Court is that *Stockman* presents no bar to the claims of the United States in these matters.

2. The Equal-Footing Doctrine.

A number of the objectors have adopted the position that the equal-footing doctrine prohibits the establishment of federal reserved water rights in Colorado to the extent they post-date its statehood. The Master-Referee is of the opinion that the doctrine cannot be so construed.

a. *Description of the Doctrine and Rationale of the Objectors.*

The Congress is empowered to admit new states to the Union by Article IV, §3 of the United States Constitution. As interpreted by the United States Supreme Court, this requires that new states be admitted on an "equal

footing" with the original thirteen states. *Skiriotes v. Florida,* 313 U.S. 69, 61 Sup. Ct. 924, 85 L. Ed. 1193 [1941]. This means that newly-admitted states must be equal to the original thirteen "in power, dignity, and authority" and "competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself." *Coyle v. Smith,* 221 U.S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853 [1911]; *Skiriotes v. Florida, supra.*

The objectors argue that, since the United States had no interest in the water of the original thirteen states, under the equal-footing doctrine it can have no interest in the waters within the state of Colorado. The objectors contend that each of the original states retained ownership of its waters upon admission to the Union and, hence, Colorado must also be deemed to own the waters within its boundaries. Since Colorado owns the waters within the state, the United States can therefore claim no reserved rights to water on federal lands in the state.

b. *Inapplicability of the Equal-Footing Doctrine.*

The arguments of the objectors based on the equal-footing doctrine closely parallel those based on *Stockman v. Leddy, supra,* in that they attempt to establish state ownership of waters within its boundaries. State ownership is said to preclude the establishment of reserved water rights post-dating the time of assumption of state ownership — August 1, 1876. The Master-Referee concludes that the doctrine cannot be so construed.

(1) The Doctrine Does Not Apply In This Matter Where Proprietary Rights Are Involved.

The equal-footing doctrine does not command that all states must enter the Union equal in economic stature and property rights to the original thirteen. As the Supreme

Court stated in *United States v. Texas,* 339 U.S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 [1950]:

> "The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See Stearns v. State of Minnesota, 179 U.S. 223, 245, 21 S.Ct. 73, 81, 45 L.Ed. 162. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See Stearns v. State of Minnesota, supra, 179 U.S. pages 243-245, 21 S.Ct. pages 80-81. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. *The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.*" [emphasis supplied]

See also *Coyle v. Smith, supra.* Thus, while the State of Colorado most certainly entered the Union on par with the original states as regards sovereignty, it cannot be argued that the United States was forced to transfer its ownership of the waters on all public lands to the state under the equal-footing doctrine. To do so expands the doctrine in a direction foreclosed by the clear statement of *United States v. Texas, supra.*

The Master-Referee, of course, recognizes that the

equal-footing doctrine can have a direct effect on certain property rights where the property right is so identified with a sovereign power of government that it cannot be separated therefrom. *United States v. Oregon,* 295 U.S. 1, 55 Sup. Ct. 610, 79 L. Ed. 1267 [1935]; *United States v. Texas, supra.* For example, this rule has generally been applied to uphold the transfer of ownership of the beds and shores of navigable streams from the United States to the states upon their admission to the Union. See *United States v. Texas, supra,* and cases cited therein. The Master-Referee is of the opinion, however, that the decision of the Supreme Court in *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 [1963] made it clear that this rule cannot be extended to prohibit the establishment of federal reserved rights after a state's admission. In this case, any property interest of the state to the ownership of waters within its boundaries is not so identified with its sovereign power as to require invocation of the equal-footing doctrine.

(2) Available Authority Establishes That Reserved Rights Exist as an Exception to State Water Ownership.

Even if the equal-footing doctrine could be extended to apply on the facts of this case, however, it still cannot be interpreted to preclude the post-statehood establishment of federal reserved water rights in Colorado. Whether based on concepts of equal footing or the language of *Stockman v. Leddy,* the theory that state ownership of water precludes the establishment of federal reserved rights is unacceptable in light of *United States v. District Court in and for Eagle County, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 [1971]. At the risk of being repetitive, the Master-Referee again notes that the Supreme Court stated therein that the federal government had the authority "both before *and after* a state is admit-

ted into the union" [emphasis supplied] to reserve waters appurtenant to federally-reserved lands. Indeed, in making this statement, the Court relied on *Arizona v. California, supra,* a case in which, as noted above, federal reserved rights were established after the admission of Arizona to the Union.

Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 [1908], also lends support to the conclusion that the equal-footing doctrine cannot be applied to bar the establishment of federal reserved rights. The Supreme Court rejected the argument that the equal-footing doctrine prohibited the existence of reserved rights in a state admitted under the doctrine. The case is not conclusive in this matter because the waters reserved in *Winters* were reserved prior to Montana's statehood. The Master-Referee believes, however, that the statements made therein are certainly persuasive, particularly in light of *Eagle County* and *Arizona v. California.*

The Master-referee concludes that the cited cases establish at the very least that reserved rights created after admission of a state to the Union under the equal-footing doctrine must exist as an exception to the state's otherwise complete ownership of the waters within its boundaries.

3. *Filings by the United States Forest Service with the Colorado State Engineer.*

Whether the United States has exercised its power to reserve waters on a particular reservation is a question of intent to be determined from the facts surrounding the reservation. The testimony and exhibits presented in this matter reveal that the United States Forest Service has at times filed maps and statements with the Colorado state engineer in addition to obtaining water right decrees from Colorado courts for the use of water on national forest lands. The objectors contend that the series of filings

made by the United States Forest Service indicate that the United States intended to acquire water rights on the national forest in accord with state law and did not intend to reserve waters thereon when the forests were established.

The testimony and exhibits, especially those presented by the City and County of Denver, do indeed demonstrate that the United States Forest Service made a number of filings with the state engineer and has obtained decrees for water right priorities under state law. Furthermore, it was apparently Forest Service policy to do so, as is indicated by several of the Forest Service manuals presented into evidence by various objectors. See Twin Lakes Reservoir and Canal Co. Ex. No. 10, 12, 13. This policy and the acts of administration thereunder continued until approximately 1965 when the Forest Service adopted a print-out system of compiling its water rights. Tr., Oct. 24, 1973, p. 102. The question for decision is whether these filings and/or applications and the stated Forest Service policy demonstrate a lack of intent by Congress to reserve water on the national forests in Colorado. The Master-Referee concludes that they do not.

A Forest Service policy to adhere to state water law in obtaining water uses does not necessarily imply a corresponding intent to relinquish any reserved rights to the use of water on forest lands. The evidence presented in this case demonstrates that this is so.

First, though the evidence indicates that the Forest Service did submit a number of filings and applications, it also indicates that it submitted only a minute proportion of its total known water uses. The testimony of the government's witness shows that of the 3,385 water uses on forest lands in Water Divisions No. 4, 5, and 6 known to Forest Service officials in 1969, only 312 had ever been submitted in the form of a map and statement to the state engineer, a total of 9.3 percent of the government's uses.

Tr., Oct. 24, 1973, p. 24. A far fewer number of rights, only 0.71 percent, were ever adjudicated in Colorado courts at the behest of the Forest Service. Tr., Oct. 24, 1973, p. 24. These percentages are reduced even more when computed against more recent and more complete compilations of Forest Service uses. Tr., Oct. 24, 1973, p. 25. In addition, a government witness testified that water is actively used on forest lands based squarely on the reserved rights of the United States. Tr., Dec. 12, 1972. pp. 68-124.

This evidence does not bear out the contention that the United States intended to utilize state water law in acquiring water uses on national forests. The extremely small number of filings made and decrees obtained by the government speaks for itself and shows that no organized effort was made to implement any apparent Forest Service policy to adhere to state law. Of greater significance is that for the vast majority of its uses the Forest Service has ignored state requirements and based its uses on the reserved right doctrine alone. As stated by government counsel in brief, it would be illogical to assume that the Forest Service would have filed on one-tenth of its water uses had it understood that such filings would result in the loss of the remaining nine-tenths.

Other evidence presented by the government clearly shows the reason behind the filings and application of the federal government. Rather than representing acquiescence to state law, the filings were intended to notify the state and other water users that a water use based on the reservation doctrine was being established on forest land. Tr., Dec. 12, 1973, pp. 148-49. This is illustrated by the fact that the United States ceased utilizing Colorado state law when it adopted its print-out compilation of water uses for advising the state and water users. Tr., Oct. 24, 1973, p. 102. Any filings were only in additon to the superior rights

of the United States. Tr., Oct. 24, 1973, p. 101. One must conclude that the compliance of the United States with state law was not intended to represent an acceptance of its restrictions or to constitute a rejection of reserved rights.

Even if the Forest Service policy could be read to constitute a decision by the Service to relinquish reserved rights on forest lands, the Master-Referee would be of the opinion that the policy could not divest the United States of its national forest reserved rights. It is settled that the interpretation of a Congressional enactment fairly susceptible to varying interpretations by those charged with its execution are entitled to great respect when used in determining the intent of the enactment. *Udall v. Tallman,* 380 U.S. 1, 85 Sup. Ct. 792, 13 L. Ed. 2d 616 (1965); *Zemel v. Rusk,* 381 U.S. 1, 85 Sup. Ct. 1271, 14 L. Ed. 2nd 179 (1965). An administrative construction which is incorrect, however, must be rejected by a reviewing court. *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 93 Sup. Ct. 2507, 37 L. Ed. 2d 688 (1973). The Master-Referee is of the opinion that an administrative rejection of reserved rights would be improper and of no effect upon the government's reserved rights. Only Congress is empowered to manage and dispose of federal property. *United States Const.,* Art. IV,§3.

Since the Master-Referee, as more fully described in subsequent sections, is of the opinion that the United States did reserve waters appurtenant to the national forests in this matter, any administrative construction which purported to divest the United States of these rights would be *ultra vires*, violative of the Constitution and contrary to the intent of the Congress to establish the reserves. Acceptance of such an administrative construction would divest the United States of a lawful property right by administrative action—something prohibited by Article IV, §3 of the Constitution.

The Master-Referee concludes that the filings and claims of the Forest Service made according to state water law under the Forest Service policy, for the reasons above, do not divest the United States of its reserved rights on the Colorado national forests involved herein.

4. *The Acts of July 26, 1866, and July 9, 1870, and the Desert Land Act of 1877.*

The objectors contend that the Lode Law of July 26, 1866, the Act of July 9, 1870, and the Desert Land Act of March 3, 1877, prohibit the establishment of federal reserved water rights. It is argued that these Acts were intended to sever the land and water on all federally-owned public lands and to make all such water subject to appropriation under the laws of the various states. The Master-Referee is of the opinion that these Acts, as interpreted by the United States Supreme Court, were not intended to constitute a full divestment of the rights of the United States to the use of reserved waters on federal reserved lands.

a. *The Provisions of the Acts.*

The Lode Law of July 26, 1866, as codified at 30 U.S.C. §51, provides:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures

> or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (emphasis supplied)

The Act of July 9, 1870, as modified in 1891 and codified at 30 U.S.C. §52, provides:

> "All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title."

Finally, the Desert Land Act of 1877, as codified at 43 U.S.C. §321 *et seq.*, provides in pertinent part:

> "That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." (emphasis supplied)

b. *Scope of the Acts as Interpreted by the United States Supreme Court.*

There can be no doubt that these Acts, on their face, opened up to appropriation under state law the non-navigable waters on the public lands of the United States. In *California Oregon Power Co. v. Bever Portland Cement Co.*, 295 U.S. 142, 55 Sup. Ct. 725, 79 L. Ed. (1935), the Supreme Court said of the Acts of 1866 and 1970:

> "The effect of *these acts* is not limited to rights acquired before 1866. They reach into the future as well, and *approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.*" (emphasis supplied)

The Court was even more ephatic concerning the effect of the Desert Land Act:

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v Johnson (C.C.) 89 F. 556, 558. *The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.*" (emphasis supplied)

The *Beaver Portland* decision makes it clear that all waters on *public lands* must be considered to be open to appropriation under applicable state law.

These declarations, however, cannot be interpreted to mean that the United States has similarly made all waters on *reserved lands* subject to appropriation under state law. The Supreme Court has expressly limited the effect of the Acts of 1866 and 1870 and the Desert Land Act and the holdings of *Beaver Portland* to the *public lands* of the United States. As the court said in *Federal Power Commission v. Oregon,* 349 U.S. 435, 75 Sup. Ct. 832, 99L Ed. 1215 (1955):

> "The nature and effect of these Acts have been discussed previously by this Court. The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240. The Desert Land Act severed, for purposes of private acquisition, soil and water rights on *public lands,* and provided that such water rights were to be acquired in the manner provided by the law of the State of location. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356. See also, State of Nebraska v. State of Wyoming, 325 U.S. 589, 611-616, 65 S. Ct. 1332, 1347-1350, 89 L. Ed. 1815.
>
> "It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the expressed delegation or conveyance of power that is claimed

by the State, because **these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers sources of water supply upon the public lands * * *. The lands before us in this case are not 'public lands' but 'reservations.'** " (double underlining supplied)

This rationale was expressly affirmed by the Supreme Court in its recent decision in *Cappaert v. United States,*_____U.S._____ (June 6, 1976) (44 L.W. 4736), in which the Court refused to overrule the *Federal Power Commission* decision.

None of the claims of the United States made in these matters for reserved water rights is sought for land which is a part of the public domain. Rather, all of the claims are made for water on or appurtenant to various federal reservations. Since the Acts in question cannot be considered to be applicable on reserved lands, the Master-Referee must conclude that these Acts do not prohibit the establishment of federal reserved water rights in these matters.

5. *Was Water Reserved for Use on the Various Reservations Involved Herein?*

Having concluded that the various arguments raised by the objectors do not strip the United States of its power to reserve waters in Colorado, the Master-Referee must next determine whether the federal government actually exercised that power when it created the various reservations involved in this litigation. More precisely, the question to be investigated is whether the United

States, as a factual matter, intended to reserve waters for the reservations when it created them.

In general, water cannot be said to have been reserved for the benefit of a particular federal reservation of land unless the United States can show that it intended to so reserve the water. *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *United States v. District Court in and for County of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971); *Cappaert v. United States,* _____ U.S. _____ (June 7, 1976) (44 L.W. 4236). The intent need not be express but may be implied from the circumstances surrounding the reservation. *Winters v. United States, supra; Arizona v. California, supra; United States v. District Court in and for Eagle County, Colorado, supra; Cappaert v. United States, supra.* The implied intent rationale was originally established in *Winters, supra,* a case dealing with reserved waters appurtenant to a Montana Indian reservation. The Court held there that, since waters were necessary to accomplish the purpose of the reservation, the government must have intended to reserve waters for its benefit. The *Winters* rationale was later affirmed in connection with Indian reservations in *Arizona v. California, supra,* where the Court found an implied intent to reserve waters for five Arizona Indian reservations.

None of the reservations involved in this matter are Indian reservations. Despite this, it is clear that the implied intent rationale developed in relation to Indian reservations applies equally to other forms of federal withdrawals. In *Arizona v. California, supra,* reserved rights appurtenant to four non-Indian reservations were recognized without any finding that the waters were expressly reserved by the United States. The rationale was

even more clearly extended in *United States v. District Court in and for County of Eagle, Colorado, supra,* wherein the Court stated that waters may be reserved for "any federal enclave" and that "the reservation may be only implied." If any doubts about the rationale remained after *Eagle County,* they were surely laid to rest by *Cappaert v. United States, supra,* in which the Court stated, in a case dealing with reserved rights on a national monument, that intent to reserve" . . . is inferred if previously unappropriated waters are necessary to accomplish the purposes for which a reservation was created." The Master-Referee concludes that the implied intent rationale is equally applicable to any form of federal reservation.

The implied intent rationale is particularly important in these matters since none of the statutes or reserving documents for the instant reservations manifests any express intent to reserve appurtenant waters.* Based on the evidence submitted, however, it appears that the United States did intend to reserve waters sufficient to carry out the purposes of the Colorado reservations involved in this case. Water was and is necessary to effectuate the purposes of the reservations and the Master-Referee is of the opinion that such water was impliedly reserved by the United States for the benefit of each of the reservations in question. Without water the purposes of the reservations would be frustrated. It is in the light of these facts and the decisions of the United States Supreme Court that the Master-Referee concludes that the United States did reserve waters to achieve the purposes of all the reservations involved in these matters.

C. Purposes for Which the Reservations Were Created.

The threshold conclusion that the United States did

exercise its power to reserve waters appurtnenant to the instant reservations is only the initial step in the analysis of the issues in this case. Mere recognition of the right does nothing to define and limit its scope as is required by the reservation doctrine. Three additional questions must be determined to define the scope of the reserved right as it exists in favor of each reservation:

1. What are the purposes of the reservation to be served by the reserved right?

2. What amount of water is the United States entitled to utilize under the right for each purpose?

3. What priority date is each reservation entitled to for the purpose of administration by the Colorado state engineer?

Since each type of reservation was created for different purposes, it is necessary to deal separately with each form of reservation involved herein.

1. *Purposes of the National Forests.*

The issue of purposes of the national forests was extensively briefed and argued by the United States and the objectors in this matter. Mountains of evidence were presented at the various hearings before the Master-Referee. No other type of reservation involved herein was so hotly contested by counsel. The Master-Referee believes that the identification of forest purposes constitutes one of the most important issues in this case. The amounts of water claimed by the United States, which are hinged directly to the purposes of the reservations, appear to be greater for the various forests than for any other type of reservation. Any limitation of forest purposes beyond those asserted by the United States will have an immense effect on the amounts of reserved water ultimately awarded in this

action. For these reasons, the discussion of the nature of the purposes of the national forests will be more extensive than that regarding the purposes of other types of reservation. This is not to minimize the importance of the others, but simply reflects the importance given by the parties to and merited by the issue of the national forest purposes.

a. *Contentions of the United States and the Objectors.*

1. *United States' Position.*

In its various statements of claim and applications the United States claimed that the national forests were created under the Organic Act of 1897, 16 U.S.C. §475, for the following numerous purposes:

1. Growth, management, and production of a continuous supply of timber;

2. Recreation;

3. Domestic uses;

4. Municipal and administrative-site uses;

5. Agriculture and irrigation;

6. Stock grazing and watering;

7. The development, conservation, and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;

8. Fire fighting and prevention;

9. Forest improvement and protection;

10. Commercial, drinking, and sanitary uses;

11. Road watering;

12. Watershed protection and management and the securing of favorable conditions of water flows;

13. Wilderness preservation;

14. Flood, soil, and erosion control;

15. Preservation of scenic, aesthetic, and other public values;

16. Fish culture, conservation, habitat protection, and management.

It is with respect to the final category that the United States claims the right to the maintenance of continuous, uninterrupted flows of water and minimum stream and lake levels. Although the United States continued to assert these broad purposes in its Opening Brief, *see* Opening Brief of the United States, pp. 9-11, the United States later* appeared to retreat from these broad purposes and adopt the position that the forests were originally created and established for only five purposes. Those are:

1. The protection of watersheds and the main-

*In its Reply Brief, Supplemental Reply Brief, and Oral Argument.

tenance of natural flow in streams below the sheds;

2. Production of timber;

3. Production of forage for domestic animals;

4. Protection and propagation of wildlife; and
5. Recreation for the general public.

See Reply Brief of the United States, p. 1; Supplemental Reply Brief of the United States, pp. 29-31; Tr., Dec. 5, 1975, p. 21. This revised position relies heavily upon the Master's Report in *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963), which found that the national forests there involved were indeed established for those same five purposes cited above, based on the Multiple-Use Sustained-Yield Act of 1960. That Act, as now codified at 16 U.S.C., §§528 to 531, provides in pertinent part at §528;

> "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."

The United States also argues that proper interpretation of the Organic Act of 1897 also bears out its contention that the forests were originally established for the five purposes enumerated in 1960. The Organic Act, codified at 16 U.S.C. §475, provides in pertinent part:

> "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water

> flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ."

2. *Objectors' Position.*

The objectors adopt a far more limited view of the national forest purposes. They contend that until 1960 the purposes of the forests were strictly limited to those specifically stated in the 1897 Organic Act. They contend that no range, recreation, or wildlife and fish purpose can possibly be attributed to the national forests until 1960 when the Multiple Use Act expanded the original purposes.

Since the reserved right exists only to serve the purposes of the forests and since the reserved right for national forests may be granted a priority date no earlier than the date a forest purpose first existed, the date on which each forest purpose came into existence is a crucial determination.

b. *Conclusion of the Master-Referee.*

After fully analyzing the issued raised by the parties herein, the Master-Referee is one of the opinion and concludes that the national forests were established by the Organic Act of 1897 for only the limited purposes specified therein. Not until 1960, with the passage of the Multiple Use Act, were the forest purposes expanded to include range, recreation, and wildlife and fish purposes. Based on this conclusion, the Master-Referee is of the opinion that the United States cannot be awarded a reserved right for minimum stream flows and lake levels in the national forests having a priority date earlier than the effective date of the Multiple Use Act of 1960. The reasons for this conclusion are addressed in the subsequent sections.

c. *The 1963 Decision of Arizona v. California.*

In *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct.

1468, 10 L. Ed. 2d 542 (1963), the Supreme Court for the first time recognized the existence of reserved rights appurtenant to federal enclaves other than Indian reservations. One such enclave was the Gila National Forest. In doing so, the Court affirmed the findings of the Special Master who had also found that reserved rights existed on the Gila National Forest. *Arizona v. California,* Report of the special Master, p. 293. Unlike the Master, the Supreme Court did not specifically address the issue of the purposes of the national forests, nor the Gila National Forest in particular. The Master only once touched upon the subject in his long report. He stated at page 96:

> "There are eleven National Forests in the Lower Colorado River basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.

The United States relies heavily upon this statement of the master to conclude that the forests, as established by the Organic Act of 1897, were created to serve all of the purposes mentioned by the Master. It contends that the report of the Master was adopted and approved by the Supreme Court with respect to this specific finding. United States Reply Brief, p. 1-2.

The Master-Referee is of the opinion that the decision of the United States Supreme Court in *Arizona v. California* did not address or settle the issue of the purposes of the national forest. For the reasons discussed below, the Master-Referee believes that this question is still open to

consideration despite *Arizona v. California* and that its consideration may properly be address in this litigation.

1. *Comments in Arizona v. California, supra, Regarding the Report of the Special Master.*

In its opinion in *Arizona v. California,* the Supreme Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

> "In these proceedings, the United States has asserted claims to waters in the main river and in some of the tributaries for use on Indian Reservations, National Forests, Recreational and Wildlife Areas and other government lands and works. While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. *We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian Reservations.*

Regarding the decree of the Master, the Supreme Court had this to say in its opinion:

> *"While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled.* Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will

> allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court."

The decree ultimately adopted by the Supreme Court made no reference to the purposes for which the national forests were originally established. *See Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 Ed. 2d 757 1964. Neither, for that matter, did the decree proposed by the Master specifically state the purposes of the national forests.

The question raised by all of this is whether the Supreme Court actually did approve the findings and rulings of the Master regarding forest purposes or whether that issue was left undetermined by the Court and hence open to decision herein.

2. *The Supreme Court Did Not Specifically Approve the Conclusion of the Master Regarding Forest Purposes.*

The only comment in *Arizona v. California* addressing the issue of reserved rights for non-Indian enclaves made by the Supreme Court was the following:

> "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future

> requirments of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."

While this brief statement constitutes a clear expansion of the reservations doctrine, the Master-Referee cannot conclude that this statement in and of itself is an adoption and approval of all the findings of the Special Master, including those concerning the purposes of the national forests. Thus, the Master-Referee has closely examined the statements of the Court cited in (1) *supra,* to determine whether the Court otherwise adopted those findings of the Special Master.

Initially, it should be reemphasized that the Supreme Court specifically approved, though it did not adopt, only the decree recommended by the Master regarding the claims of the United States. It did not specifically adopt his findings and conclusions as well. This is particularly significant since the Master's statement of forest purposes appears only in his preliminary findings and not in the decree itself. Naturally, the Master-Referee recognizes that any decree must be based on preliminary findings and conclusions. Approval of the decree, however, does not automatically imply approval of every preliminary finding and conclusion, especially when, as in *Arizona v. California,* the decree was not ultimately adopted by the Supreme Court. A careful analysis of the opinion and decree of the Supreme Court in *Arizona v. California* indicates that the Court did not intend to adopt or approve the conclusions of the Master regarding the purposes for which the national forests were established.

In the decree it did adopt, the Supreme Court, as the Master did in his decree, granted to the Gila National Forest reserved waters sufficient "to fulfill the purposes

of the Gila National Forest . . ." *Arizona v. California,* 376 U.S. 340, 350, 84 Sup. Ct. 755, 761, 11 L. Ed. 2d 757 (1964). No elaboration of what those purposes were was made by the Court. That the reserved right doctrine existed to serve the purposes for which Indian reservations were created was known since *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908). By its decree, the Court extended the recognized rationale of *Winters* to permit reserved waters to be applied to fulfill the purposes of various non-Indian reservations as well. At most, the Court's approval of the decree of the Master can be read to constitute an approval of the Master's application of the *Winters* rationale to non-Indian enclaves. To interpret its approval of the decree to be an approval of the Master's findings regarding the nature of national forest purposes would be to read language into the Master's decree which does not appear and would thus impermissibly broaden the Court's approval of the decree.

This conclusion is particularly compelling in light of the fact that there is no indication that the Supreme Court addressed the issue of forest purposes at all. The Court itself noted that it *had not ruled on some questions* addressed by the Master. *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963), as cited above. The purposes issue appears to be one area not broached by the Court. The opinion and decree of the Court was utterly devoid of any reference to the purposes for which the forests were established. This is certainly evidence that the issue was not confronted by the Court. Moreover, and examination of the briefs and other materials before the Court in *Arizona v. California* indicates that the issue was not one raised for the Court's consideration. Rather, the issues raised by the parties concentrated almost exclusively upon whether reserved rights could in fact exist for the benefit of non-Indian

enclaves. This is to be expected since no prior case had so found and the parties were clearly more interested in litigating the existence of the right than its potential scope. Indeed, if anything, the Court was probably under the impression that the forest purposes were only those stated in the Organic Act of 1897. In its Proposed Findings of Fact, Conclusions of Law, and Decree, and in its Brief in support thereof, the United States recognized that the 1897 Act stated the forest purposes. At p. 59 of its Brief in support the United States said:

> "The national forests are *used* for the protection of watersheds to maintain the natural flow of the streams below, for the production and harvesting of timber, for the production and harvesting of forage for domestic livestock permitted on the reservations, for the protection and propagation of fish and wildlife, and for recreation uses by the general public. (United States' Proposed Finding 8.1.) *Particularly significant is the fact that the Act of June 4, 1897, prescribing the* PURPOSES *for which public lands could be reserved as national forests provided, inter alia, that 'no national forest shall be established, except to improve and protect the forests within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and, necessities of citizens of the United States;* *** (30 Stat. 34; 16 U.S.C. 475." (emphesis supplied)

If the Supreme Court reached a conclusion as to the purposes of the national forests, it certainly was not included in the opinion. The briefs and other materials before the Court tend to indicate that, if such was at issue at all, it was peripheral to the major issue faced by the

Court—whether the reserved right existed at all for non-Indian reservations.

Finally, and most importantly, the *Arizona v. California* opinion gives an *affirmative* indication that the forest purposes issue was not intended to be settled by the Court. At 373 U.S. 546, 593, 83 Sup. Ct. 1468, 1495, 10L. Ed. 2d 542, 575, (1963), the Court, in reference to the claims of the United States for reserved rights, stated: "we shall discuss only the claims of the United States on behalf of the Indian Reservations." While the Court may well have approved the decree of the Master, it seems clear from this statement that the Court did not intend to foreclose future analysis and discussion of the reserved rights issue relating to various non-Indian reservations. Indeed, nine years later, in *United States v. District Court in and for County of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971), the Court reemphasized the fact that it had not fully addressed and resolved all issues concerning non-Indian reserved rights claims when it stated:

> "As we said in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.*, at 597, 83 S.Ct. at 1496. The federally reserved lands include any federal enclave. **In *Arizona v. California* we were primarily concerned with Indian reservations.** *Id.*, at 598-601, 83 S.Ct. 1496-1498" (double emphasis supplied)

This quotation again evidences the intent of the Supreme Court in *Arizona v. California* to expand the general scope

of the reservation doctrine to non-Indian lands without foreclosing future, well-considered determinations of the right's specific ingredients.

Finally, it cannot be argued that the decree of the Supreme Court in *Arizona v. California* forecloses the purposes issue by granting specific amounts of water to the forest based on the purposes found by the Master. The Master quantified the amount of water granted to the Gila National Forest only to the extent of finding that the uses were *de minimis* and hence unnecessary of precise quantification. Because of this, no inference of the purposes to be served can be made from the amounts granted.

Based on the foregoing, the Master-Referee can only conclude that the Supreme Court in *Arizona v. California* did not intent to adopt the findings of the Master regarding the specific purposes of the national forest. The statements of the Court in its opinion and decree and all other indications cited by the Master-Referee plainly show that the primary interest of the Court regarding the non-Indian reservations was in extending the general reserved right doctrine to them. The Master-Referee is of the opinion that the Court did not intend to foreclose future courts from examining the specific question of national forest purposes.

d. *Statutes Creating the National Forest System and Interpretations Thereof.*

Both the United States and the objectors have relied on the same statutes which create and regulate the national forest system to support their widely-differing contentions regarding the national forest purposes.

(1) *The Creative Act of 1891, 16 U.S.C. §471.*

The national forest [then called forest reserves] system was created by Congress in the Creative Act of 1891. That

enactment, as now codified at 16 U.S.C. §471, provides in pertinent part:

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof."

The Act itself was devoid of any reference to the purposes of the national forests, a fact for which it was later criticized. Bassman, *The 1897 Organic Act: A Historical Perspective,* 7 Nat. Res. Law. 503 (1974); *see also* "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of The Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897. Since the 1891 Act itself is unhelpful, the Master-Referee may resort to various interpretive aids in determining the meaning of the statute. *Flora v. United States,* 357 U.S. 63, 78 Sup. Ct. 1079, 2 L. Ed. 2d 1165 (1958); *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 54 Sup. Ct. 599, 78 L. Ed. 1109 (1934). These aids lead to the conclusion that the forest reserve system was established for the dual purpose of watershed protection and preservation of timber.

A memorial of the American Forestry Association in 1890 urged the Congress to:

> ". . . secure the magnificent forests on these lands from destruction by axe and flame within a comparatively short

> period . . . [They] will be needed as an important source of timber supply for the western states for all time to come . . . *the greatest value of these forests to the present and future inhabitants of the western states is in the assistance they render to agriculture through their influences on the water supply and the climate* . . . there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulator of rainfall and water supply." (emphasis supplied) 21 Cong. Rec. at 2537-38, 51st Cong., 1st Sess., 1890.

That this was the intent of the Creative Act of 1891 is further evidenced by the administrative construction given the Act by the then Division of Forestry. In its report for 1891, the Division stated in pertinent part:

> "There can hardly be any doubt, however, as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more especially for the future prosperity of the people residing near such reservations, namely, first, to assure continuous forest cover of the soil and mountain slopes and crests for the purposes of preserving or equalizing water flow in the streams which are to serve the purposes of irrigation, and to prevent formation of torrents and soil-washing; second, to asure a continuous supply of wood material from the timbered areas by cutting judiciously

and with a view to reproduction. Secondary objects, such as can and will be subserved at the same time with those first cited are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate, but the first class is infinitely more important, and the second is easily provided for in securing the first.

> *"Since there have arisen misconceptions in regard to these propositions it may, perhaps, be proper to emphasize the fact that the multiplication of national parks in remote and picturesque regions was not the intent of the law, but it was specifically designed to prevent the great annual conflagrations, to prevent useless destruction of public property, to provide benefit and revenue from the sale of forest products as needed for fuel and lumber by residents of the locality, and altogether to administer this valuable and much endangered resource for present and future benefit. These, I take it, are the objects of the proposed reservations."* Report of the Chief of the Division of Forestry for 1891, pp. 223-5. (emphasis supplied)

As interpreted by the Division of Forestry, the purposes of the forest reserves were felt to be quite clear. Watershed protection for the benefit of users below the forest and timber preservation were the twin reasons for creation of the forest reserves. Although preservation of the forests

would naturally protect and increase the recreational and aesthetic opportunities provided within the forest, these were not the purposes behind the reservations. *See also Ex Parte Hyde,* 194 Fed. 207 (N.D. Cal. 1904). That "multiplication of national parks . . . was not the intent of the law," was also strongly reinforced by the enactment of the Organic Administration Act of 1897, 30 Stat. 34.

(2) *The Organic Administration Act of 1897, 30 Stat. 34 (1897).*

The Creative Act of 1891 was regarded by Congress as an ineffectual mechanism for the creation and administration of the forest reserves. Bassman, *The 1897 Organic Act: A Historical Perspective,* 7 Nat. Res. Law. 503 (1974); *see also* "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong.,1st Sess., 1897. Indeed, not only was the Act itself unclear as to the very purposes for which forest reserves could be created, but it also failed to provide any system whatsoever for the administration of the reserves. *Id.* Congress was particularly concerned that it had created forest reservations of indiscriminate size, purpose, and formation which would hinder the economic development of the western states. 30 Cong. Rec. 900, 908,55th Cong., 1st Sess., 1897. In order to correct the shortcomings of the Creative Act, Congress passed the Organic Administration Act of 1897. 30 Stat. 34 (1897). Among its provisions was a clear statement of purposes for which forest reserves could be established and a set of criteria governing use and administration of the forests.

(a) *Statement of Forest Purposes.*

One of the most important contributions of the Organic Act of 1897 was its clear and conclusive statement of the

purposes for which forests could be created. In pertinent part, as now codified at 16 U.S.C. §475, the Act provides:

> "All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. *No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States;* but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." (emphasis supplied)

The Master-Referee is of the opinion that the cited language expresses all of the purposes for which forest reserves could be created under the Organic Act of 1897. The Act is clear on its face that these constitute the *only* purposes of the national forests, at least until the passage of the Multiple-Use Act of 1960. The statement of purposes clearly indicates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful supplies of timber therein from destruction. No mention is made of any recreational, aesthetic, or wildlife and fish purposes as are claimed by the United States to be part of the purposes established by the Organic Act of 1897. The words of the statute are clear and no broader interpretation or effect can be made than that which appears on their face.

(b) *Effect of 16 U.S.C. §551.*

Despite the clear limitation of forest purposes found in 16 U.S.C. §475, the United States contends that 16 U.S.C. §551 indicates that Congress envisioned broader purposes than those stated therein. Originally passed as part of the Organic Act of 1897 (at 30 Stat. 35), 16 U.S.C. §551 empowers the Secretary of Agriculture to make rules and regulations to insure objects of the forests through the control of their occupancy and use. It provides:

> "The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

Because such multiple *uses* of the national forests as recreation and wildlife and fish management have been permitted and administered over the years under the cited section, the United States contends that the *purposes* of the forests must therefore be broader than those limited ones expressed by 16 U.S.C. §475. The Master-Referee is

of the opinion that 16 U.S.C. §551 in no way expands the purposes for which national forests can be established.

First, it is imperative to examine the language of 16 U.S.C. §551. It provides the Secretary of Agriculture with the power to make provisions for the protection of the national forests from fire and depradation. To do so the Secretary is empowered to make rules and regulations ". . . as will insure the *objects*. . ." of the reservation. These rules and regulations are to regulate the occupancy and *use* of the forests and preserve them from destruction. The Master-Referee is of the opinion that this provision does no more than order the Secretary to preserve the objects or purposes of the forests as they were enumerated in the Organic Act (16 U.S.C. §475) as discussed above.

One of the major deficiencies of the Creative Act of 1891 which the Organic Act was designed to remedy was the former's failure to provide a basis for the regulation and administration of the forests once they were reserved. Bassman, *The 1897 Organic Act: A Historical Perspective,* 7 Nat. Res. Law. 503 (1974); "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897. The Master-Referee concludes that section 551 was intended to remedy this deficiency. Thus, in order to insure that the forests achieved their stated objects or purposes (watershed protection and timber preservation), regulation of the various internal activities in the forests was essential lest those activities or uses should interfere with the paramount forest objects or purposes. That many *uses* could and would be made of the forests was surely known to Congress as is indicated in The Report of the Chief of the Division of Forestry for 1891. Indeed, the Organic Act, as

now codified at 16 U.S.C. §478, permitted ". . . any person (to enter) upon such national forests for all proper and lawful purposes . . ." *so long as* there was compliance with rules and regulations adopted under 16 U.S.C. §551. That some of these uses might even be recreational was also realized by Congress, albeit at a later date. Act of March 4, 1915, 16 U.S.C. §497. Certainly, such vast areas of land were never intended to be completely withdrawn from all lawful human *use.* But, Congress recognized that all *uses* of the forests would need to be regulated to insure the achievement of the specific statutory objects or purposes expressed in 16 U.S.C. §475. Consequently, the thrust of 16 U.S.C. §551 is to regulate forest *uses,* not to somehow equate forest *uses* with forest *purposes.* Indeed, the existence of this section indicates that Congress was concerned that the numerous uses to be made of the forest might be antithetical to the achievement of their purposes. Hence, the Secretary was empowered to regulate the uses appropriately.

Those cases which have dealt with 16 U.S.C. §551 fully support the conclusion of the Master-Referee. For example, in *United States v. Grimaud,* 220 U.S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land. The Court first noted the purposes for which the forests were created:

> "From the various acts relating to the establishment and management of forest reservations, it appears that they were intended 'to improve and protect the forest and to secure favorable conditons of water flows.' "

The Court then noted the regulatory power provided to the Secretary by §551 and went on to say:

> "Under these acts, therefore, any use of the

reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another." (emphasis added)

The case could not be more clear. The Supreme Court recognized that the forests were established for the limited purposes stated by 16 U.S.C. §475. It quoted that section. It then went on to define clearly the intent of 16 U.S.C. §551. According to the Court, it existed to provide the Secretary the means to regulate *uses* on the forest which could indeed be "inconsistent" with the attainment of forest purposes even though permitted under 16 U.S.C. §478. The section in no way permitted the Secretary to legislate broader forest purposes than those in 16 U.S.C.§475. As the Court stated:

> "Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."

In support of this construction, *see also Light v. United States,* 220 U.S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1911).

The case of *United States v. Hunt,* 19 F.2d 634 (D. Ariz. 1927) also lends support to the interpretation of the Master-Referee and conforms to the rationale established by *United States v. Grimaud, supra.* In that case, the United States sought to enjoin the State of Arizona from interfering with its administration of the Kaibab National Forest. Specifically, Arizona was attempting to assert the applicability of its game laws on the forest land. The United States alleged its right, in contradiction of any Arizona game laws, to regulate the deer population on the forest lands in order to protect young trees. The Court found that the state of Arizona could not apply its game laws on the forest lands and enjoined their applicability and enforcement on such. The Court based its decision upon the power of the Secretary of Agriculture to regulate the activities on national forest lands under 16 U.S.C. §551. The Court recognized the duty of the Secretary to protect the forest from destruction. Since the deer were feeding on the young trees within the forest, the Court found that the Secretary could lawfully act to preserve the trees even if in contradiction of Arizona law. Again, the interpretation of the Court is clear. Section 551 provides a mechanism for protecting forests purposes. It does not recognize forest uses, there the hunting of deer, as purposes for which water may be reserved.

The case of *United States v. Johnston,* 38 F. Supp. 4 (D. W.Va. 1941) also adopts the *Grimaud* rationale. The issue was the government's attempt to prohibit grazing by defendant upon lands of the Monongahela National Forest. Defendants contended that the fence laws of West

Virginia required the United States and themselves to share the cost of a fence between their lands and that the United States could not simply prohibit grazing without correspondingly assisting with the construction of a fence. The Court disagreed. The Court first noted the purposes of the national forests:

> "The Congress has declared the purposes for which national forests are established to be improve and protect the forest within the reservation, and for the purpose of securing favorable condition of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States. 16 U.S.C.A. §475."

The intent of §551 was then addressed:

> "The Congress authorized the Secretary of Agriculture to make such rules and regulations as would be necessary to insure the objects for the creation of such reservations, and the Congress made the violation of such rules and regulations a penal offense."

The Court went on to uphold the validity of the Secretary's regulations even though they may have violated West Virginia law. In doing so, the Court cited the *Grimaud* and *Light* decisions. Again, the intent of §551 could not have been more clearly expressed. The purposes of the forest are limited. Their achievement must be protected even if state law is not respected in the face of uses which may be inconsistent with them. Such an inconsistent use can certainly not be labeled a forest purpose. (The Master-Referee suggests that *United States v. Shannon*, 151 Fed. 863 (D. Mont. 1907) also supports his conclusion. Again, the issue was the regulation of grazing upon forest lands. The defendant claimed to be under no

obligation under state law to fence his cattle from the Little Belt Forest Reserve. The Court found that the United States was empowered to prohibit grazing on its forest land. The Court first noted the damage grazing had done to the forest:

> "It sufficiently appears that damage to the water supply is done by the grazing of more cattle in Lone Tree Park than the number authorized by the Secretary of the Interior, and that the young growth of willows and underbrush is seriously injured by the tramping of cattle."

This damage interfered with the purposes of the forests as established in the Organic Act:

> "Agriculture, lumbering, mining, and live stock interests are all more or less dependent upon a permanent and accessible supply of water, wood, and forage. *It need scarcely be said that plainly the whole policy of forest reservation rests upon legislation having regard for the future welfare, and is intended to foster and protect living and growing timber on forest reservations.* Act June 4, 1897, c. 2, 30 Stat. 35, 36, may be called an essentially constructive statute." (emphasis supplied)

To prohibit such interference, said the Court, Congress passed section 551 as part of the Creative Act:

> "In the furtherance of this policy, and to make its execution effective, Congress also provided by the act just referred to that the Secretary of the Interior might make such rules and regulations, and establish such service, as would 'insure the objects of such

reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.' This was a delegation of significant power to the Secretary of the Interior. It gave to that official authority to construct in detail an administration which would make certain or 'insure', as the law puts it, the will of Congress with respect to forest reservations. *Protection of living timber, the cultivation of younger growths, protection against fire, protection against depredation — all are among the expressly enumerated features of the act. By explicit language, too, regulation of occupancy and use is included within the authority conferred, and was evidently regarded as a necessary part of the power which the Secretary should possess, to the end that the whole policy might be made as effective as possible." (emphasis supplied)*

The Court upheld the Secretary's regulation on the basis of this analysis, finding Congress' power to mandate such regulation to supersede countervailing state law.

The Master-Referee is aware that the regulations of the Secretary of Agriculture need not necessarily be designed exclusively to prevent destruction of the national forests. *United States v. Hymans,* 463 F.2d 615 [10th Cir. 1972); *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965); *United States v. Reeves,* 39 F. Supp. 580 (W.D. Ark. 1941). Under the "occupancy and use" provision of §551 the Secretary may regulate public uses even though they do not endanger forest purposes. This is not inconsistent with the conclusion of the Master-Referee. The *purposes* of the forests were established by 16 U.S.C. §475. When it

enacted 16 U.S.C. §478 as part of the Organic Act, Congress recognized that there were many potential uses which would differ from but which would not be inconsistent with the forest purposes. Furthermore, Section 551 provides the power to regulate these uses as long as ". . . such rules and regulations tend to protect the lands and faithfully preserve the interest of the people of the whole country . . ." *United States v. Reeves, supra.* For example, the Secretary may regulate "skinnydipping" in the forests if it would preserve the interest of the public even though the practice would not destroy the forest. *United States v. Hymans, supra.* This does not imply that every such regulated use or activity rises to the level of a forest purpose. It simply permits the regulation of all forest uses, not only those necessary to the accomplishment of forest purposes, as may be desirable to protect the general public interest under 16 U.S.C. §478. The limited purposes of the forest are confined by statute and consistent interpretations thereof, however, to those limited ones expressed in the Organic Act itself. Indeed, as one of the objectors described it:

> "The Government's argument here is the logical equivalent of contending that since Congress has authorized the Secretary of the Interior to regulate white traders on Indian reservations, Indian reservations were created to promote trading." Supplemental Brief of the Twin Lakes Reservoir and Canal Co., p. 11.

While 16 U.S.C. §478, §51, certainly recognizes that multiple forest uses were permissible even under the Organic Act of 1897, those uses were required to be regulated simply to insure the objects of the forest. The Master-Referee concludes that §551 in no way expands the limited purposes stated in 16 U.S.C. §475.

(c) *Scope of the Words: ". . . to improve and protect the forest within the boundaries . . ."*

The United States also contends that the use of the words ". . . to improve and protect the forest within the boundaries . . .", *see* 16 U.S.C. §475, by Congress in its statement of forest purposes somehow expands the original purposes of the forest beyond those of watershed protection and timber preservation. It claims that this phrase somehow encompasses recreational and other purposes not otherwise explicit in the Act. The Master-Referee does not agree.

First of all, such an interpretation is wholly inconsistent with the cases which have addressed the purposes of the Organic Act. *See,* for example, *United States v. Grimaud, supra; Light v. United States, supra; United States v. Hunt, supra; United States v. Johnston, supra; United States v. Shannon, supra; see also Honchok v. Hardin,* 326 F. Supp. 988 (D. Md. 1971). Those cases clearly indicate that the essential purposes of the forest expressed in the Organic Act are limited to watershed protection and timber preservation. Forest improvement and protection are merely mechanisms to assure that the forests maintain their value for the expressed purposes.

In addition, the words of the Act themselves are clear as to the meaning of this phrase. At most, the phrase can be read to relate to the need to regulate and protect the forests in order that they may retain their value as protectors of the watershed and sources of timber supply. Nothing in the Organic Act, in 16 U.S.C. §475 or otherwise, hints that the purposes of the forest were to be greater than those. To so interpret the cited phrase would expand the meaning of the Act beyond its own limits and the interpretations of reviewing courts.

(d) *Interpretation of the Organic Act of 1897 in Light of Various Interpretive Aids*

The United States contends that proper construction of the Organic Act of 1897 reveals that the purposes of the Act are indeed broader than watershed protection and timber preservation. It offers several recognized techniques of statutory interpretation to support its assertion. The Master-Referee is of the opinion that these interpretive techniques, if they may properly be employed here, reveal that the purposes of the forests are in fact fully set forth by 16 U.S.C. §475.

The Master-Referee recognizes that it is his duty to glean the legislative intent of the various statutes presented to him for interpretation. To do so, the Master-Referee must utilize every aid to statutory construction in order to discover the true meaning of a statute as intended by the lawmaking body. *Flora v. United States,* 362 U.S. 145, 80 Sup. Ct. 630, 4 L. Ed. 2d 623 (1960); *United States v. Cooper Corp.,* 312 U.S. 600, 61 Sup. Ct. 742, 85 L. Ed. 1071 (1941); *United States v. Kung Chen Fur Corp.,* 188 F. 2d 577 (U.S. Cust. Ct. 1951).

The primary aid, of course, in divining the legislative intent of a statute is the statute's own wording. *Caminetti v. United States,* 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917); *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 54 Sup. Ct. 599, 78 L. Ed. 1109 (1934); *Robinson v. State,* 155 Colo. 9, 392 P.2d 606 (1964). The various extrinsic aids cannot be invoked unless the statute itself is ambiguous; they may not be invoked to create ambiguity. *United States v. Kung Chen Fur Corp., supra.* The Master-Referee is of the opinion tha the words of the Organic Act of 1897 clearly express the purposes for which Congress intended the national forests to be established. Numerous cases support the Master-Referee's finding of

such limited purposes. *United States v. Grimaud, supra; Light v. United States, supra; United States v. Hunt, supra; United States v. Johnston, supra; United States v. Shannon, supra; Honchok v. Hardin, supra; Ex Parte Hyde,* 194 Fed. 207 (N.D. Cal. 1904). Resort to extrinsic aids is unnecessary and probably improper in this matter.

The Master-Referee, however, understands that words are inexact tools and that reference is often had to various interpretive aids even where the statute appears to be clear on its face. *Tidewater Oil Co. v. United States,* 409 U.S. 151, 93 Sup. Ct. 408, 34 L. Ed. 2d 375 (1972); *Harrison v. Northern Trust Co.,* 317 U.S. 476, 63 Sup. Ct. 361, 87 L. Ed. 407 (1943). The Master-Referee has therefore examined the contention of the United States that various tools of statutory construction reveal that purposes broader than those expressed in 16 U.S.C. §475 were intended by the Organic Act. As a result of his investigation, the Master-Referee remains convinced that just the opposite is true.

(i) *Statutory History.*

The legislative history of an act of Congress is frequently the most fruitful source of instruction as to its proper interpretation. *Flora v. United States,* 362 U.S. 145, 80 Sup. Ct. 630, 4 L. Ed. 2d 623 (1960). That the purposes of the national forests were envisioned by Congress to be economic rather than recreational or aesthetic is clearly displayed in a statement by Rep. McRae of Arkansas, one of the chief sponsors of the Organic Act of 1897. He said:

> "Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a

> steadier flow, with fewer overflows and less low water.
>
> "As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.
>
> *"The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.*
>
> "It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established." 30 Cong. Rec., p. 966, (emphasis supplied).

This statement leaves no doubt that Congress fully considered the purposes to be accomplished by the national

forests and that it fully expressed these purposes in 16 U.S.C. §475. Recreation, while considered a proper forest *use,* was clearly rejected as a forest *purpose.* The forests were not to be parks set aside for nonuse. They were intended to protect the watershed for the benefit of irrigators and other economic users and to preserve a supply of timber. The institution of minimum stream flows or lake levels to fulfill various noneconomic purposes was clearly not considered.

Senator White of California bolstered this interpretation of the purposes of the forests when he said: "We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply." 30 Cong. Rec., p. 917.

The joint purposes of watershed protection and timber preservation were expressed by Rep. Ellis of Oregon as well:

> *"They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such . . .*
>
> ". . . as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.
>
> . . .
>
> "I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply." 30 Cong. Rec., pp. 1006-07. (emphasis supplied)

No inference that the forests had any recreational purpose is possible.

Even the Report of the Committee on the Inauguration of Forest Policy, May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897, which addresses the broad topic of forest policy in general, is vacant of any reference to recreational purposes of the forests. It, too, concentrates on the functions of the forests as protectors of the watershed and sources of timber supply. In pertinent part, it states at p. 8: "The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century."

Later at p. 36 it continues:

> *"Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . .*
>
> . . .
>
> "It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western America is dependent upon irrigation." (emphasis supplied)

In opposition to the creation of national forests for the limited purposes of watershed and timber protection is the Report's suggestion that parts of two forest reserves be set aside as national parks. The Report indicates that these wo areas, Mt. Rainier and the Grand Canyon, contain

". . . features of supreme natural beauty . . ." and that they therefore ought to ". . . be preserved for the enjoyment and instruction of the world by creating them national parks . . ." Report, at p. 35. This recommendation clearly indicates that, as Rep. McCrea said, national forests were not contemplated as parks set aside for nonuse. Such areas were treated differently and reserved for different purposes.

The legislative history of the Organic Act could not be more clear. It contains not even a hint that national forests were intended to encompass any but the twin purposes of watershed protection and timber preservation. Recreation was not considered to be a purpose, and indeed was rejected as a forest purpose. The creation and protection of the national forests under the Organic Act were solely for the purposes stated in 16 U.S.C. §475. The Master-Referee notes that the legislative history fully support his position on 16 U.S.C. §551 as well as his interpretation of the ". . . improve and protect . . ." language of 16 U.S.C. §475. On the basis of the legislative history, the Master -Referee is convinced that his conclusion as to the purposes of the national forests is correct.

(ii) *Administrative Interpretations.*

Despite the convincing legislative history of the Organic Act, the United States contends that the construction of the act by various administrators indicates that Congress intended broader purposes than those specifically expressed in 16 U.S.C. §475. It is well settled that the practical construction of a statute or act of Congress, *fairly susceptible of different constructions,* by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. *Udall v. Tallman,* 380 U.S. 1, 85 Sup.

Ct. 792, 13 O. Ed. 2d 616 (1965); *Zemel v. Rusk,* 381 U.S. 1, 85 Sup. Ct. 1271, 14 L. Ed. 2d 179 (1965); *Bowman v. Eldher,* 149 Colo. 551, 369 P.2d 977 (1962). In spite of his conclusion that the Organic Act is not fairly susceptible of differing constructions, the Master-Referee recognizes the United States' contention that the undisturbed administrative construction of the Organic Act by those charged with its execution (permitting recreational, aesthetic, and other uses of the national forests) indicates that Congress intended these uses to constitute forest purposes under the Act. The Master-Referee has examined these constructions and cannot agree.

In its Reply Brief, the United States offers numerous citations from various administrative manuals, letters, and other documents prepared by various administrators to prove its contention. Many of these do indeed deal with recreational, aesthetic, scenic, and wildlife and fish uses of the forests. Upon examination, it become clear that these citations reveal only that recreational and other related uses have never been considered to be more than a proper and lawful *use* of the forests and indeed never a *purpose.*

The earliest administrative comment cited by the United States is from the 1902 edition of the Forest Reserve Manual. At page 8 appears the following:

> "All law-abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims, and for pleasure and recreation." U.S. Ex. E-1.

Rather than constitute an expanded administrative interpretation of the purposes of the national forests, this section paraphrases 16 U.S.C. §478, enacted as part of the Organic Act at 30 Stat. 36. It simply restates that persons may enter the forests for all lawful reasons, including

recreation. If anything, Congressional acquiescence in this interpretation only shows that recreation is a proper forest *use* under 16 U.S.C. §478, despite the fact that it is not mentioned therein. The Master-Referee has no dispute with that. The cited section cannot be read, however, as an administrative expansion of forest *purposes.*

In 1905 the Department of Agriculture published its forest reserve *Use Book.* At page 49 thereof it was stated:

> ". . . hotels, stores, mills, summer residences and similar establishments will be allowed upon reserve lands *wherever the demand is legitimate and consistent with the best interests of the reserve."* Use of the National Forest Reserves, 1905 (U.S. EX. E-15). (emphasis supplied)

Again, the Master-Referee is at a loss to see how this statement reinforces the conclusion that recreation was a *purpose* of the forests under the Organic Act. It states only that certain recreationally-related *uses* may be allowed if ". . . consistent with the best interests of the forest . . ." The *Use Book* simply recognizes that recreation is a legitimate forest *use* under 16 U.S.C. §478, though regulable under 16 U.S.C. §551 to preserve the best interests of the forest. It does not establish the use as a purpose.

The United States makes much of several statements found in the 1906 edition of the *Use Book* to support its contentions. It cites in pertinent part the following:

> "On the theory that the management of land, not of forests, was chiefly involved, this law gave the Secretary of the Interior authority over the reserves . . .

> "The regulations and instructions for the use of the National Forest reserves here published are in accordance with the act last mentioned and the various supplementary and amendatory laws passed since June 4, 1897. They are based upon the following general policy laid down for the Forest Service by the Secretary of Agriculture in his letter to the Forester dated February 1, 1905:
>
> " 'In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies. All the resources of forest reserves are for *use,* and this *use* must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources . . . In the management of each reserve local questions will be decided upon local grounds; the dominant industry will be considered first, but with as little restriction to minor industries as may be possible; sudden changes in industrial conditions will be avoided by gradual adjustment after due notice, and where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run.' " The Use of the Forest Reserves (1906), pp. 15-17. (U.S. Ex. B-33) (emphasis supplied)

The Master-Referee has no argument with the *Use Book's* interpretation. It merely restates and reaffirms that the Organic Act has always allowed lawful and proper uses on the forest. The forests were not parks set aside for nonuse. This section, however, cannot be understood to expand forest purposes in any measure. Nothing in its language states anything which would support such an expansion. Interestingly, statements made in the *Use Book* immediately before and after the cited paragraph clearly indicate that this section was not intended to contemplate an expansion of forest purposes. At p. 13 is found the following:

> *"Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forests and range.*
>
> . . .
>
> "We know that the welfare of every community is dependent upon a cheap and plentiful supply of timber; that a forest cover is the most effective means of maintaining a regular stream flow for irrigation and other useful purposes, and that the permanence of the lifestock industry depends upon the conservative use of the range. The injury to all persons and industries which results from the destruction of forests by fire and careless use is a matter of history in older countries, and has long been the cause of anxiety and loss in the United States. The protection of the forest resources still existing is a matter

> of urgent local and national importance. This is shown by the exhaustion of lumbering centers, often leaving behind desolation and depression in business; the vast public and private losses through unnecessary forest fires; the increasing use of lumber per capita by a still more rapidly increasing population; decrease in the summer flow on streams just as they become indispensable to manufacture or irrigation; and the serious decrease in the carrying capacity of the summer range." (emphasis supplied)

It is for the preservation of these forest purposes that the rules and regulations mentioned in the above *Use Book* citation were mandated. Indeed, it continues:

> "You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the home builder first of all, upon whom depends the best permanent use of lands and resources alike. *The continued prosperity of agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future use of these resources under businesslike regulations, enforced with promptness, effectiveness, and common sense.* In the management of each reserve local questions will be decided upon local grounds; the dominant industry will be considered first, but with as little restriction to minor industries as may be possible; sudden changes in industrial conditions will be

> avoided by gradual adjustment after due notice, and where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run." (emphasis supplied)

The implication is clear. Not only does the *Use Book* of 1906 as cited by the United States fail to support its contentions, but instead it provides a firm basis for a contrary conclusion.

That the Forest Service itself recognized that forest purposes were limited by the Organic Act and that it so construed the Act is further confirmed by the Report of the Chief Forester in 1913. The Report states:

> "*"The national forests are set aside specifically for the protection of water resources and the production of timber. . . . p. 10. (emphasis supplied)*
>
> *"The fundamental aim in administering the national forests is to develop their resources for the permanent upbuilding of the country.* The whole object of their administration would be defeated by closing the forests to development and maintaining them as a wilderness. *The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on esthetic grounds."* p. 11. (emphasis supplied)

This is a clear recognition by one of the highest Forest Service officials that the Organic Act states all of the forest purposes on its face. The concept that the forest are not parks to be set aside for economic nonuse is clearly expressed. This continuing administrative construction of forest purposes supports an interpretation in line with the plain language of the Organic Act.

The Master-Referee has examined each of the other citations offered by the United States and finds that only one can be said to support the government's position regarding the purposes of the national forests. That citation is to a study of recreational uses on the national forests commissioned by the Forest Service, Waugh, *Recreation Uses on the National Forests* (1918), U.S. Ex. E-3. The study presents the following observations:

> "Recreation upon the Forest areas is a social utility of large dimensions and very substantial value.
>
> "Recreation of many kinds, all legitimate, develops on practically all areas of the National Forests. It is inherent in the character of the Forests and must be recognized as a permanent and universal factor in Forest administration. Only by the most drastic and extraordinary administrative measures could recreation be excluded from particular Forest areas.
>
> "Being a public utility of great value and being inevitable to the Forest administration, recreation should be developed by the Forest

Service on the same basis as any other Forest utility."

At p. 27 is found the following:

> "The most logical statement of the situation is made by saying that recreation stands on a par with other major uses of the Forest areas, and is to be managed on its merits precisely like the others. These major *uses* are:
>
> Timber production.
> Grazing.
> Watershed protection.
> Recreation." (emphasis added)

And at p. 36:

> ". . . historically it appears that National Forests were first created for purposes of recreation, and that this use is traditional."

Ignoring the report's obvious confusion over the difference between "purpose" and "use," this report cannot be interpreted to imply a Congressional intent in favor of broad forest purposes. First, such an interpretation would be contrary to the consistent administrative construction of the Organic Act which adheres to the statement of purposes fund in 16 U.S.C. §475. Even if a valid administrative construction, this isolated example cannot be implied to supersede other constructions without affirmative evidence that it was intended to do so.

Second, the study from which these quotes were taken was not prepared by the Forest Service. Though it was

commissioned by the service, it was the work of a landscape architect who was not an administrator charged with execution of the Organic Act. Since legislative intent can be gleaned only from statements of those so charged, the comments of Mr. Waugh cannot be considered to represent the will of Congress in any way.

Finally, the Master-Referee cannot be bound by a construction of an administrator charged with the execution of an act when that construction is shown to be improper by other more persuasive evidence. *United States v. Dickerson,* 310 U.S. 554, 60 Sup. Ct. 1034, 84 L. Ed. 1356 (1940). To obey an erroneous administrative construction which expands the limits of a Congressional enactment would be tantamount to permitting the administrator to legislate. Here the words of the Act itself, the clear statutory history, and other interpretations by actual Forest Service administrators all indicate that the conclusion that the forests were created for a recreational purpose is unsupportable. In light of such persuasive evidence, the Master-Referee cannot conclude that the cited language reflects a Congressional intent to establish broader purposes than those of 16 U.S.C. §475.

The Master-Referee concludes that the administrative interpretation of the purposes of the Organic Act are consistent with his own. Recreation has been recognized to be a lawful, regulable forest *use* by the Forest Service. To permit from this the illogical presumption that recreation must therefore be a forest *purpose* would contravene the statute.

(iii) *Appropriations by Congress.*

The United States has cited to the Master-Referee

numerous appropriations by Congress which provide the Forest Service with financing for various recreational, scenic, wildlife and fish, and related *uses* of the forest. It has also cited numerous substantive provisions of Congressional appropriation acts which provide the Forest Service with power to implement certain recreationally-related *uses* on the national forests. The United States contends that these demonstrate that it was the intent of Congress that recreationally-related *purposes* were to be included within the Organic Act of 1897. The Master-Referee has examined the authority set forth by the government and is of the opinion that no such Congressional intent is evidenced thereby.

It is settled that repeated Congressional appropriations made with knowledge of an administrative construction of an existing law which affirms that construction may be considered as ratification of the administrative action by Congress. *Brooks, v. DeWar,* 313 U.S. 354, 61 Sup. Ct. 979, 85 L. Ed. 1399 (1941); *Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 67 Sup. Ct. 1129, 91 L. Ed. 1375 (1947). The United States contends that Congressional appropriations for recreationally-related uses on the forests affirm the construction of Forest Service administrators that the Organic Act provides that the forests were established, *inter alia,* for recreationally-related pur-

First, it should be noted that the Master-Referee has already examined the numerous administrative constructions of the Organic Act cited to him in this matter and found that they show no administrative constructions of the Organic Act cited to him in this matter and found that they show no administrative interpretation that the forests were established for recreational, scenic, or

other related *purposes.* Rather, they clearly show that the Forest Service recognized the limited forest *purposes* but, in accordance with the will of Congress, permitted proper and lawful *uses* of the forest. The Master-Referee is of the opinion that Congressional appropriations for recreationally-related uses do nothing more than confirm such administrative construction.

The United States cites three specific instances of Congressional appropriations. They are a 1908 appropriation providing funds specifically for the protection of game and fish on the forests, 35 Stat. 1039, 1048, U.S. Ex. E-8, a 1922 appropriation funding the construction of sanitary facilities and fire prevention measures on public campgrounds, 42 Stat. 507, 520, and a 1928 appropriation for investigation of forest wildlife, 45 Stat. 699, 701. None of these appropriations affirmatively express in the language used any Congressional desire or mandate that recreationally-related *purposes* be considered inherent in the Organic Act. Neither can the Master-Referee conclude that Congress intended to affirm any such administrative construction. Indeed, if anything, the appropriation acts confirm the above-stated conclusion of the Master-Referee. Under 16 U.S.C. §475, the purposes of the national forests are limited. Under 16 U.S.C. §478, however, all proper and lawful uses may be made of the national forests, subject to administrative regulation under 16 U.S.C. §551. By appropriating funds for various recreational and wildlife uses, Congress was not doing anything more than confirming the *use* of the forests for recreational purposes. It was clearly not stating that the forests were established for recreational purposes. Indeed, the 1922 appropriation for sanitary facilities and fire prevention measures at campgrounds indicates a Congressional

recognition that the forests must be protected in order that the timber and watershed not be damaged. Thus, it is extremely interesting to note that the 1922 appropriation cited by the government authorized only $10,000 for campground facilities, while at the same time authorizing $250,000 for fire fighting, $350,000 for timber testing, $100,000 for timber appraisals, $370,000 for developing uses for forest products, and $125,000 for tree planting. 42 Stat. 519-521. The Master-Referee must conclude that no expanded forest purposes are indicated by the various forest appropriations.

Apart from the actual monetary appropriations, the government has cited various substantive provisions of appropriation bills which deal with the general topic of recreationally-related forest uses. That the Congress may effectively legislate by amendments to appropriation bills is settled. *United States v. Dickerson,* 310 U.S. 554, 60 Sup. Ct. 1034, 84 L. Ed. 1356 (1940); *Friends of the Earth v. Armstrong,* 485 F.2d 1 (10th Cir. 1973). The United States contends that these enactments indicate that Congress provided that the forests had a recreational purpose long before the Multiple Use Act of 1960.

Five specific enactments are cited by the United States. They included:

1. Act of February 28, 1889, 30 Stat. 908, providing the Secretary of Interior with power to lease space adjacent to forest reserve hot springs.
2. An appropriation act of 1899 requiring forest agents to aid in enforcement of state fish and game laws.
3. Act of March 4, 1915, 38 Stat. 1101, codified in partinent part at 16 U.S.C. §497, authorizing the Secretary of Agriculture to permit

hotels and similar facilities, desirable for recreation.

4. Act of June 7, 1924, 43 Stat. 655, codified in partinent part at 16 U.S.C. §515, authorizing the Secretary to locate lands chiefly valuable forstream flow or timber production.
5. Act of March 29, 1944, authorizing the Secretaries of Agriculture and Interior to cooperate to secure stream flow, soil erosion prevention, and wildlife benefits.

The Master-Referee is of the opinion that none of these established recreation, scenic, wildlife, or aesthetic purposes of the national forests under the Organic Act.

Once again, it should be noted that none of the enactments cited by the United States indicates in any way that Congress intended to broaden the limited purposes of the national forests as found in the Organic Act. All deal with recreation as a legitimate forest *use* but none express any Congressional opinion or mandate that recreation be included as a *purpose.* At the risk of repeating himself, the Master-Referee notes that this is entirely consistent with the Organic Act, its legislative history, and administrative construction. Closer analysis of the Acts shows this interpretation of the cited acts to be compelling.

For example, while the Act of June 7, 1924, does indeed authorize location of lands valuable for stream flow, Congress did not have recreational purposes in mind. The Act specifically provides, at 16 U.S.C. §515, that stream flow importance is linked to water flows for *navigation and irrigation* or *production of timber.* That secondary recreational benefits would inure is not denied, but that these were the purpose of the stream flow protection is simply unfounded.

The Act of March 4, 1915, also clearly permits recrea-

tional uses on the forests. But, as an appropriation act, it also provides $150,000 for forest fire prevention and fighting, $140,000 for timber testing, and $165,000 for experimental tree planting — in recognition of the actual purposes of the forest.

The other enactments cited do not support the government's contentions. For example, assisting in the enforcement of local game laws in no way can be implied to create a forest recreation purpose. In short, the enactments simply recognize, often to a limited extent, the legitimacy of recreation as a forest use under 16 U.S.C. §478 and perhaps confirm administrative interpretations allowing such use under that section. To attribute more meaning to these enactments necessitates the equating of the approval of *use* with the establishment of a *purpose.*

(iv) *Other Information.*

The United States has cited a great deal of other matter, all of which is dated prior to the enactment of the Creative Act in 1891, which it contends demonstrates that the nation's forests were used for recreational purposes long before they were withdrawn as forest reserves. It is not precisely clear how these documents and materials relate to either the Organic Act of 1897 or the Creative Act of 1891. The Master-Referee is of the opinion, however, that they may be taken to represent the history of the times, utilization of which is a proper tool of statutory interpretation. *Great Northen Ry. Co. v. United States,* 315 U.S. 262, 62 Sup. Ct. 529, 86 L. Ed. 836 (1942). Since the documents and materials relate exclusively to Colorado and although the Organic Act established a forest policy for the entire nation, they may be of very dubious value in interpreting the Act. They can probably be considered fairly representative of a national attitude, however, and will thus be considered by the Master-Referee.

The United States has cited *The Report of the Commissioner of the General Land Office for the Territory of Colorado* for the years 1873 and 1874. These reports speak in glowing terms of the recreational opportunities available in Colorado in general and not just within its forest areas. Also cited is the 1879 edition of the *Sportsman Guide and Gazeteer* which similarly describes the opportunities for fishing and hunting in the state in general. More closely related to the concerns at hand are the comments of the state forest commissioner which, in 1890, concerned with the continuing destruction of the state's forest areas, suggested the reservation of certain forest lands. Such lands were said to ". . . abound in fish and wild game . . ." These documents do indeed express an appreciation of the recreational opportunities in the state as a whole.

Other statements cited by the objectors demonstrate a concern with saving the forests from destruction in order to preserve the timber supply and the watershed for downstream irrigators. For example, in 1887 the Colorado General Assembly called for the reservation of lands surrounding streams above 10,000 feet to protect the water supply for irrigation. Senate Joint Memorial No. 5, 6th Sess., Jan. 5, 1887 (U.S. Ex. B-26). The Fifth Biennial Report of the Colorado State Engineer notes the importance of proper forest maintenance for preserving water supplies. U.S. Ex. B-21. The Ninth Report of the State Engineer exhibits similar concerns. Biennial Report of the State Engineer, 1897-98 (U.S. Ex. B-22). The Colorado state forest commissioner held the same concerns and in his reports for 1885-1890 elaborated on Colorado's dependence on its forests for timber and irrigation water.Report of the State Forest Commissioner, 1885, 1886,1887, 1888, 1889, 1890 (U.S. Ex. B-6 through B-9). The general public was also aware of this important forest function. The *Weekly Gazeteer* for September 16, 1884, describes the importance of preserving the forests in order

to maintain a supply of water for irrigation. (U.S. Ex. B-11).

The Master-Referee is of the opinion that these citations, while helpful from an historical viewpoint, cannot be considered to be conclusive. If anything, they show that the public and others were aware of the specific value of the forested areas of the state for timber supply and watershed protection for irrigation, and the opportunities for recreation and sporting activities in the state generally. As such, they tend to support the conclusion of the Master-Referee that the national forests were created specifically and solely for the purposes set forth in 16 U.S.C. §475. Recreational opportunities, though naturally enhanced by their creation, were not a purpose of the forests as such, but merely a lawful use under 16 U.S.C. §78. Even if the historical material cited by the United States could be read to show that the public and others had urged the creation of national forests for recreationally-related purposes, they could not be held to vary the clear expressions of Congressional intent found on the face of the Organic Act and in its legislative history. The Master-Referee is of the opinion that the historical matter cited by the United States illustrates no intent on the part of Congress that the national forests be established for the purpose of recreation and related purposes.

(v) *Judicial Interpretation of the Organic Act.*

The United States has cited several cases which it claims support its contention that various agency-sponsored uses have been judicially affirmed as valid forest purposes. The Master-Referee has examined each of these cases as well as several others and concludes that none of them indicate

that the forests were established for any but the limited purposes of watershed protection and timber preservation.

Two of the cases cited by the United States have already been discussed by the Master-Referee in relation to his interpretation of 160 U.S.C. §551. *See* Memorandum Opinion §V.C.1.d.(2)(b), *supra.* It would be well to comment on these again briefly at this time. In *Grimaud v. United States,* 220 U.S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1911), the issue was the propriety of the Secretary of Agriculture's regulation of grazing on the national forests. As noted above, the Court expressly recognized the *limited* purposes for which the forests were established under the Organic Act, quoting 16 U.S.C. §475. The Court then went on to state that the Secretary's regulations were essential lest grazing ". . . interfere seriously with the accomplishment of the purposes for which they [the national forests] were established." Grazing was no more than a permissible forest use, but only to the extent that it did not impair the forest purposes. In further support, *see also Light v. United States,* 220 U.S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1911), a companion case to *Grimaud.*

The government contends that *United States v. Hunt,* 19 F.2d 634 (D. Ariz. 1927), gives judicial sanction to hunting as a valid purpose of the national forests. This case is also fully treated in §V.C.1.d.(2)(b) of this Memorandum Opinion. Briefly, the issue in *Hunt* was whether the Forest Service could permit hunting on the Kaibab National Forests in contravention of Arizona's game laws. The District Court for Arizona agreed that it could. Its decision was based solely on the fact the deer and other game were eating young trees and thus contributing to the destruction of the forest. To preserve the forest, the Secretary could permit hunting even if in violation of

Arizona's game laws. The case said nothing about the validity of hunting on the forest simply for recreative purposes. Hunting was permitted solely to preserve the forest from destruction in order that its united purposes could be achieved.

The government cites two cases which deal with skiing uses of the national forests, *Sierra Club v. Hickel,* 433 F.2d 24 (9th Cir. 1970), aff'd 405 U.S. 727, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972), and *Heath v. Aspen Skiing Corp.,* 325 F. Supp. 223 (D. Colo. 1971).

In *Heath,* the issue was whether an individual not permitted to do so by the Aspen Corporation could teach skiing at a facility which was licensed by the Forest Service. The District Court for Colorado held that he could not. The case did not address or even mention the issue of whether the ski area itself was somehow established in furtherance of the forest purposes. Indeed, the existence of the ski area bore no relation to the case except for the fact that it was the place of the controversy between the litigants. The case is not in point and is not authority here. In *Sierra Club,* the issue was the propriety of the permit which the Secretary of Agriculture had granted for the development of a ski area in the Mineral King Valley of California. Though it found the plaintiffs to be without standing, the Court did discuss the merits of the controversy. The immediate question was whether the Secretary was authorized to issue revocable permits and, if so, whether combined term and revocable permits were valid. In discussing the question the Court said at p. 35:

"The fact that the record discloses that there

> are now a total of at least eight-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality. Many of these developments are ski developments making use of the maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres." (footnote omitted)

This was as close as the Court came to discussing whether skiing was a valid purpose of the forest. This comment, made while the Court was discussing an entirely separate issue, is no authority for the contentions of the government. If anything, the comment simply shows skiing to be a lawful forest *use,* to be permitted when not in contravention of forest purposes. In any case, it must be noted that this case, as well as *Heath,* was decided after the enactment of the Multiple-Use Act of 1960 which did in fact make recreation a purpose of the national forests.

The final case cited by the government also fails to support the contentions of the government. In *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965), defendants were convicted of riding motorcycles in a primitive area established by the Secretary of Agriculture within the Boise National Forest and fined $100 each under 16 U.S.C. §551. Motorcycle riding within the primitive area was prohibited by regulations adopted under that section. Defendants challenged the validity of the regulations,

stating that, since they were not designed to protect the forests from destruction, they were beyond the authority of the Secretary to adopt. The court upheld the regulations on the theory that the Secretary's authority to regulate occupancy and use of the forests was not confined to regulations necessary to preserve the forests from destruction. The Master-Referee has recognized and discussed this concept above. *See* Memorandum Opinion §V.C.1.d.(2)(b), *supra.* The Court did not, however, say anything which would indicate that recreation was somehow made a purpose of the forest because it was a lawful, regulable forest use. Instead, the Court recognized that administrative interpretation of the Organic Act has always considered recreation to be no more than a legitimate *use:*

> "The consistent administrative interpretation of section 551, however, has been that while recreational considerations alone will not support the establishment of a national forest, they are appropriate subjects for regulation." p. 285.

While finding the primitive area to constitute a lawful forest use, the Court's decision cannot be interpreted to support the contention that recreation was a purpose for which the Organic Act permitted the forests to be established. Consequently, *McMichael* cannot be interpreted to stand for the proposition that recreation is a valid forest purpose under the Organic Act.

The Master-Referee concludes that judicial interpretations of the Organic Act do not support the proposition that the national forests could be established thereunder for any but timber and watershed protection purposes. In

further support of this conclusion, the Master-Referee refers the reader to §V.C.1.d.(2)(b) of this Memorandum Opinion and the discussion of *United States v. Johnston,* 38 F. Supp. 4 (S.D.W.Va 1941), and *United States v. Shannon,* 151 Fed. 863 (D. Mont. 1907) therein. *See also Honchok v. Hardin,* 326 F. Supp. 988 (D. Md. 1971).

(e) *The Multiple-Use Sustained-Yield Act of 1960: 74 Stat. 215 (1960).*

The United States also cites various provisions of the Multiple-Use Sustained-Yield Act [hereinafter Multiple Use Act] of 1960, as well as legislative history thereof, in order to support its contention that recreational purposes were inherent in the Organic Act of 1897. Since subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject, *Great Northern Ry. Co. v. United States,* 315 U.S. 262, 62 Sup. Ct. 529, 86 L. Ed. 836 (1942); *Tiger v. Western Investment Co.,* 221 U.S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738 (1911), the Master-Referee must examine the Multiple Use Act in light of the government's assertions.

(i) *Effect of the Multiple Use Act of 1960 on the Organic Act of 1897.*

The United States contends that the Multiple Use Act and its legislative history indicate that the purposes of the Organic Act included various recreationally-related forest purposes. It contends that the Act stands as a "reaffirmation and codification," (United States Reply Brief, p. 20) of an administrative policy of the Secretary of Agriculture which treated the national forests as if such purposes existed on the basis of the Organic Act. This reaffirmation, it contends, shows that Congress intended recreationally-related purposes to be included within the Organic Act of 1897. The Master-Referee is of the opinion that neither the

Multiple Use Act or its legislative history indicates that Congress intended the Organic Act to have any but the purposes of the forest improvement, timber preservation, and watershed protection.

At this point, the Master-Referee must reiterate that the materials submitted to him for his interpretation and review do not indicate that there ever existed any administrative policy within the Forest Service which declared recreation or related *purposes* to be inherent in the Organic Act. These materials, as well as numerous others, have been examined and fully discussed in other sections of this opinion. They show only that the consistent administrative and judicial interpretation of the Organic Act considered recreation and related *uses* to be lawful and regulable uses of the forests. No administrative or judicial sanction has even been given to the concept that the Organic Act encompasses recreation as a forest purpose. There is therefore no basis upon which to argue that the Multiple Use Act merely reaffirms and codifies an administrative policy which so treated recreation.

Apart from this, the Multiple Use Act and its legislative history show that Congress intended the Act to *expand* the previously limited purposes stated in the Organic Act, rather than to be a retroactive reaffirmation of purposes inherent therein. In pertinent part, as now codified at 16 U.S.C. §528, the Multiple Use Act states:

> "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, rtimber, watershed, and wildlife and fish purposes. The purposes of sections 528 and 531 of this Title are declared to be *supplemental* to, but *not in derogation of, the*

> purposes for which the national forests were established as set forth in section 475 of this title." (emphasis supplied)

The underscored language in the preceding citation recognizes that the Multiple Use Act was intended to establish new and additional purposes for the forests as of the date of its enactment in 1960. In light of its express statement that the purposes which it establishes are supplemental to those of the Organic Act, the Act cannot be read as declaratory of a pre-existing Congressional policy. This being so, the Master-Referee concludes that outdoor recreation, range, and wildlife and fish purposes have existed as national forest purposes only since the enactment of the Multiple Use Act.

This conclusion is further supported by the legislative history of the Multiple Use Act. The report of the House Committee specifically addresses the language set forth above. In describing how forests now could be established under the 1960 Act, it states:

> "The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897. *Thus, in any establishment of a national forest a purpose set out in the 1897 act*

> *must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest* [under the 1960 Act] *if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act."* House Report No. 1551 or House Report 10572, April 25, 1960, 86th Cong. 2nd Sess., p. 4. (emphasis supplied)

The committee report is highly conclusive of what Congress intended by the Multiple Use Act. It expressly recognizes the limited purposes of the Organic Act and states that the new purposes set out in the Multiple Use Act are "additional." They did not exist under the terms of the Organic Act. Indeed, it is interesting to note that, even after 1960, recreationally-related purposes alone will not support the establishment of a national forest. At least one of the purposes of the Organic Act must be present to justify national forest establishment.

The committee report also recognizes that under the Organic Act recreation was merely a lawful and regulable use of the national forests. A letter from E. L. Peterson, Acting Secretary of the Department of Agriculture, which was included in the report, states in part:

> "The authority to administer recreation and wildlife habitat resources of the national

> forests has been recognized in numerous appropriation acts and comes from the authority contained in the act of June 4, 1897, to regulate the 'occupancy and use' of the national forests." *Id.*

The Master-Referee is of the opinion that the Multiple Use Act and its legislative history clearly indicate that the only forest purposes established by the Organic Act are those stated in 16 U.S.C. §475. In 1960 these purposes were expanded in accord with the dictate of the Multiple Use Act as stated in 16 U.S.C. §528.

(ii) *The Multiple Use Act in This Litigation.*

The conclusion of the Master-Referee that neither the Multiple Use Act nor its legislative history can be read as an expansion of the limited purposes of the Organic Act does not conclude the 1960 Act's role in this case. Like the Organic Act before it, the Multiple Use Act establishes certain purposes for the national forests. The Organic Act permits the establishment of the forests for the purpose of improving and protecting the forest, for securing favorable conditions of water flows, and to furnish a continuous timber supply. To this list, the Multiple Use Act adds outdoor recreation, range, and fish and wildlife purposes, though the legislative history cited above makes it clear that a forest cannot be established for one of the newer purposes only. A purpose stated in the Organic Act must also be present.

It should be noted that the purposes stated in the Multiple Use Act do not apply only to forests established after the date of its enactment. The language of the Act and the legislative history indicate that its purposes attach to forests existing as of that date as well. As the Act states:

> "It is the policy of the Congress that the national forests *are* established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. §528. (emphasis supplied)

The use of the word "are" in this first sentence of 16 U.S.C. §528 indicates that the purposes of the Multiple Use Act were intended by Congress to attach to existing forests as well as those created after passage of the Act. The legislative history of the Act also is helpful on this point. It indicates that the basic function of the Multiple Use Act was to provide direction to the Secretary of Agriculture to administer forests on a multiple use and sustained yield basis. House Report No. 1551 or House Report No. 10572, April 25, 1960, 86th Cong., 2nd Sess., p. 1. Nowhere does the report indicate that the directive was to apply only to future forests. Indeed, its language clearly shows that the directive covered all forests — existing and future — as of the date of the Act. *Id. passim.* To hold otherwise would thwart the clear intent of the Act, just as to hold that the Act is somehow retroactive would impermissibly expand its scope. *Id.*, p. 4.

The importance of the foregoing to this litigation, of course, relates to the need for water to acieve the purposes of the Multiple Use Act. Under the reservation doctrine, unappropriated water is reserved to accomplish the purposes of a reservation. On June 12, 1960, the Multiple Use Act broadened the purposes of the national forests. Consequently, as of that date, reserved water could be utilized in sufficient amounts to satisfy the outdoor recreation, range, and fish and wildlife purposes of the national forests, provided sufficient unappropriated water was

available. Prior to that date, reserved water could be utilized only to achieve the Organic Act's purposes of improving and protecting the forest, watershed protection, and timber preservation and supply.

e. *Minimum Stream Flows and Lake Levels.*

A question of great importance in this litigation is whether the United States may be granted the right to utilize reserved waters to maintain minimum stream flows and lake levels for streams and lakes within the national forests. Since reserved water may be utilized only as is necessary to accomplish the purposes for which a particular reservation was created, water to maintain minimum stream and lake levels may be granted under the reservation doctrine only if it will further some established national forest purpose. The United States in its claims, briefs, and oral arguments has attempted to demonstrate that minimum stream flows and lake levels are cognizable under three basic forest purposes. They are:

1. The purpose of ". . . securing favorable conditions of water flows . . ." expressed in the Organic Act of 1897, 16 U.S.C. §475.
2. The purpose of ". . . outdoor recreation . . ." expressed in the Multiple Use Act of 1960, 16 U.S.C. §528.
3. The purpose of ". . . wildlife and fish . . ." expressed in the Multiple Use Act of 1960, 16 U.S.C. §528.

The Master-Referee is of the opinion that minimum stream flows and lake levels are cognizable only under the

forest purposes of outdoor recreation and wildlife and fish. Since these were not forest purposes prior to the enacement of the Multiple Use Act of 1960, the United States is not entitled to utilize water to accomplish them pursuant to the reservation doctrine except under priorities as of and subsequent to June 12, 1960, the date of the Act. Consequently, no claim for minimum stream flows and lake levels predating June 12, 1960, will be recognized by the Master-Referee.

(1) *"Minimum" v. "Adequate" v. "Appropriate" Stream Flows and Lake Levels.*

There exists some confusion in this action regarding whether the United States seeks *minimum, adequate,* or *appropriate* stream flows and lake levels on the national forests. Before deciding whether reserved water may be utilized for the maintenance of any stream and lake levels on the national forests, the Master-Referee will attempt to resolve the confusion regarding this matter.

In its statements of claim and applications for the use of reserved water on the national forests, the United States clearly claimed *minimum* stream flows and lake levels for the forests. No other term was used to describe the sought in-place uses.

In contrast, at the oral arguments, government counsel clearly attempted to distinguish the terms "adequate" and "minimum" and to argue that the United States was seeking "adequate" in-place uses. *See* Argument of Mr. Meshorer, Tr., Dec. 6, 1974, pp. 277-278. *See also* Reply Brief of United States, at, for example, p. 4, and Proposed Findings of Fact, Conclusions of Law and Decree of the United States at, for example, p. 72. At that portion of the

evidentiary hearing regarding water uses on the national forest, the government witness spoke in terms of neither minimum nor adequate in-place uses. Rather, he preferred the term "appropriate." *See,* for example, Tr., Dec. 12, 1972, pp. 121-122; Dec. 13, 1972, pp. 18, 56; Dec. 14, 1972, p. 57. The witness did state that he preferred that term since he felt the term "minimum" was often connected simply with flows necessary for fish preservation, while the United States was seeking broader in-place uses. It is evident from this brief review that the precise nature of the water use which the government seeks has become somewhat clouded. The Master-Referee is of the opinion that he should grant, if at all, reserved rights for "minimum" in-place uses as claimed by the United States.

The statements of claim and applications of the United States must set the standards upon which this litigation is based. In these statements and applications, the United States explicitly claimed *minimum* in-place uses for the national forests. Naturally, a statement of claim or application may be amended, but that does not appear to be the case here. No oral or written amendment was ever offered. At trial, certain statements were made by the government witness that he preferred the term "appropriate" in relation to the in-place uses. These statements cannot be considered to have changed the government's position in any way. Except to say that he feared that the term "minimum"was often connected only with in-place uses for fish, a limited view understood by the Master-Referee not to represent fully the government's claims (*see* the United States' Statements of Claim and Applications for the National Forests Herein), the witness did not

demonstrate how the term "appropriate" differed from "minimum." Neither has the government shown how the term "adequate" differs from either "minimum" or "appropriate." Indeed, the government witness himself noted that the terms really mean little, if anything, until an amount is associated with them. As he said:

> ". . . I think the claims talk in terms of 'minimum.' I have been talking in terms of 'appropriate,' and all this sort of thing.
>
> "Now you can't really talk in terms of 'minimum' or 'appropriate' unless you can hang a number on it so the people know what you are talking about, and that is quantification." Tr., Dec. 14, 1972, p. 57.

The government has requested, and has been granted herein, the opportunity to quantify those reserved right claims which may be granted in this proceeding. This will include the various in-place uses. At that time, when all the evidence is before the proper court, the precise meaning of "minimum" can be determined in light of the purposes of the national forests. At this point in the litigation, however, the Master-Referee is of the opinion that the United States must be limited to the terms of its statements of claim and applications and be granted, if any, "minimum" stream flows and lake levels. No formal amendment was offered and no evidence was presented which would justify an amendment to the statements of claim and applications.

(2) *Scope of Organic Act Purpose of ". . . securing favorable conditions of water flows . . .": 16 U.S.C. §475.*

As stated above, the Master-Referee has concluded that minimum stream flows and lake levels may not be granted to fulfill the forest purpose, as stated in the Organic Act, of ". . . securing favorable conditions of water flows . . ." The Master-Referee is of the opinion that the Organic Act and its legislative history clearly indicate that this purpose comprehends that the forests be reserved to protect its watershed qualities in order to make available increased water supplies for off-the-forest users. Permitting on-forest minimum flows and lake levels may well be inconsistent with the fulfillment of the above-stated purpose.

The Organic Act itself makes it clear that enhanced water supplies created by the reservation and protection of the forests were to be available for use by appropriators. According to the Act, as now codified at 16 U.S.C. §481:

> "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The very terms of this section indicate that "all" waters provided by the national forests were to be available for utilization by appropriators for various purposes. Indeed, the Forest Service has followed this dictate by granting to appropriators rights-of-way across forest lands under, among others, the Act of March 3, 1891, codified in perti-

nent part at 43 U.S.C. §946 *et seq.*, the Act of February 15, 1901, 43 U.S.C. §959, and the Act of February 1, 1905, codified in pertinent part at 16 U.S.C. §524. These rights-of-way provisions have allowed appropriators to enter and take water from the forests in fulfillment of various off-the-forest needs. This is in conformity with the terms of the Organic Act. To say that the utilization of reserved waters to maintain minimum stream flows and lake levels would somehow fulfill the purposes of the forests as stated in the Organic Act would truly be illogical and inconsistent with their purposes.

The legislative history of the Organic Act also supports the conclusion that in-stream uses would be inconsistent with the watershed protection purposes of the national forests. Although already discussed in §V.C.1.d.(2)(d)(i), *supra*, the legislative history of the Act bears some repeating.

Rep. McRae of Arkansas, a chief sponsor of the Organic Act, was one of those who believed that the forests were to supply water to off-the-forest users. As he said:

> *"Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.*
>
> "As long as the forests stand, the branches,

> the branches, fallen leaves, and roots will hold much of the rain and snow until summer, *and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts. . . .*
>
> *"The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.*
>
> *"It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established." 30 Cong. Rec., p. 966. (emphasis supplied)*

The representative from Arkansas was aware of the importance of forest land in protecting the watershed and urged the creation of forests for the purpose of their protection. The reason for this is made clear in his statement that the forests would ". . . furnish water not only for the navigation of our rivers, but also for the irrigation of the deserts."

Indeed, many Congressmen viewed the essential purpose of the national forest as the protection of watersheds in order to provide water for off-forest users. Rep. Ellis of Oregon stated:

> *"They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such . . .*
>
> ". . . as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.
>
> *"I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply."* 30 Cong. Rec., pp. 1006-07. (emphasis supplied)

Rep. Loud from California emphasized the same concept:

> *". . . I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.*

> "That is the main object of the forest reserves in the State of California . . ." 30 Cong. Rec. at 1399. (emphasis supplied)

The Organic Act and its legislative history indicate that the watershed protection purpose of the national forest was viewed in economic terms. The forests were to be a source of water supply for irrigators, cities, and other appropriators. No change in this philosophy occurred until the passage of the Multiple Use Act of 1960. To permit the use of reserved water to maintain minimum stream flows and lake levels on national forest lands would be inconsistent with the reservation doctrine which permits water to be used only as the use fulfills a valid forest purpose. The Master-Referee concludes that the United States cannot be granted minimum stream flows and lake levels for the national forests under the Organic Act of 1897.

(3) *Scope of Claim Regarding Uses for Stream Flows and Lake Levels.*

Even if the forest purpose of ". . . securing favorable conditions of water flows . . ." could somehow be interpreted to permit the utilization of the reserved right to maintain minimum stream flows and lake levels, the Master-Referee is of the opinion that such a use could not be granted for the fulfillment of that purpose in this case. The Master-Referee can grant to the United States no more than it has claimed. On the basis of the claims and applications of the United States and the evidence presented purusant thereto, the Master-Referee must conclude that the United States has not *claimed* the right to utilize reserved waters for maintaining minimum stream flows and lake levels pursuant to the forest purpose stated above.

Under the heading "Amount and Uses Claimed," the

statement of claim of the United States for each of the national forests involved herein reads in pertinent part:

> "The United States claims direct water rights, storage water rights, transportation rights and well rights for purposes which include, but are not limited to, the following: growth, management and production of a continuous supply of timber; recreation; domestic uses; municipal and administrative-site uses; agriculture and irrigation; stock grazing and watering; the development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent; fire fighting and prevention; forest improvement and protection; commercial, drinking and sanitary uses; road watering; *watershed protection and management and the securing of favorable conditions* of water flows; wilderness preservation; flood, soil and erosion control; preservation of scenic, aesthetic and other public values; and *fish culture, conservation, habitat protection, and management. With respect to the category of fish culture, conservation, habitat protection, and management, the United States claims the right to the maintenance of such continuous, uninterrupted flows of water and such minimum*

> *stream and lake levels as are sufficient in quantity and quality to:*
>
> "(1) *Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters on the applicable reservation dates, or those species of fish which are thereafter introduced.*
>
> "(2) *Attain and preserve the recreational, scenic, and aesthetic conditions existing on the applicable reservation dates, or to preserve those conditions which are thereafter caused to exist.*" (emphasis supplied)

The statements of claim indicate that the United States claimed water to fulfill the numerous alleged purposes of the forest as it envisioned them in its claims. Among these purposes were:

1. "Watershed protection and management and the securing of favorable conditions of water flows."

2. "Fish culture, conservation, habitat protection, and management."

The statements of claim also indicate that the United States requested the right to use reserved waters for the maintenance of minimum stream flows and lake levels *only* in relation to the category of "fish culture, conservation, habitat protection and management." It did not claim the right to utilize waters in such a way pursuant to the watershed protection purpose. In addition, the claims indicate that the minimum stream flow and lake level use was considered by the United States to relate only to fish preservation, scenic, recreational, and aesthetic values.

At trial, the United States put on extensive evidence

regarding the various uses of reserved water on the national forests. Its approach was to discuss each of the claimed purposes separately. *See* Tr., Dec. 12, 1972, pp. 68-124. The watershed protection category is discussed at pages 105-109 of the transcript of December 12, 1972. There, on direct examination, the government witness emphasized the importance of the forest in retaining waters throughout the warm seasons and in preventing erosion and flooding. He noted that water would be utilized for seeding and irrigating of areas where timber is damaged and for reestablishing vegetation. He also noted that certain experiments in cloud seeding and lightning prevention, both of which would protect and enhance the watershed, might require the use of reserved waters.Throughout, the witness stressed the importance of the forest as a means of regulating runoff so that water would be available throughout the dry months. Not once did the witness testify that minimum stream flows and lake levels were necessary, under this limited purpose, and certainly not for the achievement of various recreational values.

Only much later, on redirect examination, did the United States attempt to connect minimum stream flows and lake levels to the forest purpose of watershed protection. *See* Tr., Dec. 13, 1972, pp. 140-141, 146-147. The responses of the witness indicate that he was uncertain of how minimum stream flow and lake level uses related to the watershed protection purpose until the answer was suggested by government counsel.

In contrast is the testimony of the government witness regarding the category of fish culture, conservation, habitat protection, and management — the only category to which in-place water uses were related in the government applications and statements of claim. Tr., Dec. 12, 1972, pp. 115-126. In this testimony, the witness spoke extensively about the need for in-place uses on the national forests in order to attain and promote various fish,

wildlife, scenic, and aesthetic values in the forests. The witness did not once attempt to relate the claimed in-place uses to the watershed protection purpose at this place in the testimony. Rather, he related the uses to values which can only be subsumed under the recreation and wildlife and fish purposes of the forest dictated by the Multiple Use Act of 1960.

For any use of reserved water to be allowed on the national forests it must relate to a valid forest purpose. The Master-Referee has concluded that these purposes can be found in the Organic Act of 1897 and the Multiple Use Act of 1960 as fully discussed in previous sections. In its statements of claim and applications for reserved rights on the national forests, the United States stated the purposes of the forest far more broadly than is justified by those Acts. It is clear, however, that the United States intended to relate its claims for in-place uses on the national forests *only* to what it called the "purpose" of "fish culture, conservation, habitat protection, and management." In addition, these in-place uses were claimed only to attain certain fish and wildlife, scenic, aesthetic, and recreational values. The claims and evidence show that in-place uses were not claimed or considered to be a part of the purpose of ". . . securing favorable conditions of water flows . . .", which in turn was not (and could not be) shown to be a purpose having recreational aspects which the claimed in-place uses were designed to fulfill. The Master-Referee must conclude that the United States did not claim minimum stream flows and lake levels in connection with the forest purpose of watershed protection. Its claims related such uses to values which can be countenanced under the forest purposes of outdoor recreation and wildlife and fish. As such, the Master-Referee is powerless to award the United States such uses pursuant to the watershed protection purpose of the forest.

(4) *Minimum Stream Flows and Lake Levels Under the Multiple Use Act of 1960: 16 U.S.C.* §528.

Remaining to be addressed is the important question of whether the United States may be granted minimum stream flows and lake levels to effectuate the forest purposes set out in the Multiple Act of 1960, 16 U.S.C. §528.

First, the Master-Referee notes that the United States already has claimed the right to certain in-place uses to fulfill at least two of the purposes of the Multiple Use Act. The United States has claimed and shown that in-place uses on the forest enhance recreational and fish values. Outdoor recreation and fish and wildlife are two purposes of the Multiple Use Act.

The more important question to be answered in regard to in-place uses on the national forests is whether such uses may be granted at all under the reservation doctrine. The Master-Referee is of the opinion that the United States may be granted minimum stream flows and lake levels as are reasonably necessary to fulfill the purposes of the national forests as stated by the Multiple Use Act of 1960, to wit, outdoor recreation and fish and wildlife purposes. Such in-place uses must be quantified as described in this Partial Report.

As long ago as *United States v. Rio Grande Dam & Irrig. Co.,* 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899), the Supreme Court recognized the right of the United States ". . . as the owner of lands bordering on a stream, *to the continued flow of its waters, at least as may be necessary for the beneficial uses of the government property.*" (emphasis supplied). Subsequent decisions of the Supreme Court developed this broad statement into the reservation doctrine. *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); *United States*

v. Powers, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939); *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *United States v. District Court in and for Couunty of Eagle, Colorado,* 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971). A fundamental precept of that doctrine, at least as it applies to non-Indian federal reservations, is that the United States may utilize unappropriated waters as are reasonably necessary to fulfill the purposes of the reservation. While none of these cases expressly recognized the right of the United States to make in-place water uses under the doctrine, certainly none denied the United States that right. Rather, they created a doctrine which, on its face, was broad enough to encompass such uses so long as they effectuated a valid reservation purpose.

The United States Supreme Court finally settled the issue of whether the reserved right doctrine permits the United States to make in-place uses of reserved water, at least with respect to waters upon national monuments, in *Cappaert v. United States,* _____ U.S. _____ (June 7, 1976) (44 L.W. 4736). In *Cappaert,* the United States claimed a reserved water right to maintain a certain level of water within the Devil's Hole National Monument as was necessary for the continued propagation and survival of the Devil's Hole pupfish. Upon review of the statute and the Presidential Proclamation under which the Monument was created, the Court found that a fundamental purpose of the Monument was the preservation of the pupfish. It therefore granted sufficient water under the reservation doctrine to fulfill that purpose, ordering that pumping from wells of the defendants be limited as

necessary to maintain in Devil's Hole that amount of water needed for preservation of the pupfish.

The Master-Referee is of the opinion that the *Cappaert* decision stands for the principle that in-place uses of reserved water may be made under the reservation doctrine in general when such uses are reasonably necessary to fulfill the purposes of a specific reservation. The reservation doctrine is certainly broad enough to encompass such uses. Indeed, the Master-Referee is of the opinion that the failure to recognize such uses when necessary to fulfill reservation purposes would constitute an erroneous and unauthorized limitation of the doctrine as developed by the United States Supreme Court.

In addition to being lawful under the general reservation doctrine, in-place uses may exist to serve the purposes of the national forests, specifically the outdoor recreation and fish and wildlife purposes of the Multiple Use Act. Since the *Cappaert* case dealt with the national monument, it is not conclusive of this issue. Its reasoning, however, is persuasive. It establishes that in-place uses of reserved water may be made where reservation purposes so require. Here also, the purposes of the reservation, as established by the Multiple Use Act, require that in-place uses of water must be made. Certainly the propagation and protection of fish and wildlife cannot be accomplished if the streams and lakes on the national forest are dried up or reduced to a level at which fish and wildlife cannot survive. Similarly, the dewatering of streams or lakes on national forests is inconsistent with the recreational values inherent in the forest purpose of outdoor recreation. Certain minimum levels of water utilized in-place must be maintained if these forest purposes are to be achieved. As the Master stated in *Arizona v. California* in regard to the Lake Mead Recreational Area:

> "Since the purposes of the Recreation Area could not be fully carried out without the use of water from the mainstream of the Colorado River, I have found that the United States intended to reserve such water for use within the Recreation Area." Master's Report at p. 293.

The same logic applies herein. Water is essential to the fulfillment of the forest purposes cited above. That the uses are in-place rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States, as of the date of the Multiple Use Act, intended to reserve water sufficient to fulfill these purposes. In doing so, the Master-Referee is aware of the decision of the District Court for the First Judicial District of the State of Idaho in *Avondale Irrigation District v. North Idaho Properties, Inc.*, No. 22418, December 2, 1975, in which the Idaho court concluded that the national forests were not established to provide minimum flows. The Master-Referee notes that the Idaho court appeared to examine minimum flows in light of the purposes of the Organic Act of 1897, and not the 1960 Multiple Use Act. As a result, the case did not appear to determine the issue of minimum flows under the latter act. To the extent that it may have done so, the Master-Referee must respectfully disagree with the conclusions stated therein.

Although older Colorado case law would indicate that in-stream uses are impermissible and that water may be appropriated in Colorado only by diversions or impoundments and applications to beneficial use, *Colorado River Water Conservation District v. Rocky Mountain Power Company*, 158 Colo. 331, 406 P.2d 798 (1965), recent amendments to the state's Water Right Determination and

Administration Act of 1969 specifically provide for such uses. 1973 Colo. S.L., p. 1521, §1. For example, the term "diversion" now includes "controlling water in its natural course or location." §37-92-103(7), C.R.S. 1973. In addition, the definition of "beneficial use" now includes the following sentence:

> "For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." §37-92-103(4), C.R.S. 1973.

It would be strange, indeed, if citizens of this state and the state itself were allowed to appropriate water for in-place uses while the federal government is denied the right to do so under the reservation doctrine.

Since the concept of in-place uses has now been accepted in Colorado and since such uses fall within the broad ambit of the reservation doctrine and the specific purposes of the national forests under the Multiple Use Act of 1960, the Master-Referee concludes that the United States is entitled to a reserved right for such uses with a priority date no earlier than June 12, 1960, subject to quantification in accordance with the first sentence of §37-92-103(4), C.R.S. 1973.

f. *Effect of 16 U.S.C. §481.*

The objectors have contended that certain uses made of waters flowing within the national forests must be superior

to any reserved rights which the United States may be found to possess in this proceeding. They base their contention on the provisions of 16 U.S.C. §481, originally enacted by Congress as a part of the Organic Act, 30 Stat. 36 (1897). That section reads:

> "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The objectors argue that this section makes available for use, whether on the reservation or off, all national forest waters which are employed under Colorado law for the specific purposes enumerated therein. Since §481, *supra,* is clear on its face, since the Multiple Use Act of 1960 left §481 undisturbed, and since no legislative history for either the Organic Act or the Multiple Use Act has been discovered by the Master-Referee which would disclose any contrary Congressional intent, the Master-Referee is of the opinion that the contentions of the objectors are correct and that United States' reserved rights on the various national forests must be subject to Colorado water rights for domestic, mining, milling, or irrigation purposes whether such rights bear priority dates before or after the date of reservation of the waters appurtenant to the national forests.

g. *Water Uses Which May Be Made to Fulfill the Purposes of the National Forests Involved Herein.*

As described below, various types of water uses may be

made of reserved waters to fulfill the purposes for which the national forests were created. *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v. California,* 375 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). No use may be allowed, however, unless it does in fact fulfill a valid purpose of the national forests as set out in the preceding analysis. This is a particular problem in the case of the national forests, since the purposes for which they are established accrued under different statutes at far different dates. As a result the following is true:

1. Reserved water may be utilized under the Creative Act of 1891 and the Organic Act of 1897 to fulfill the following purposes:
   a. To improve and protect the forest,
   b. To secure favorable conditions of water flows,
   c. To furnish a continuous supply of timber.
2. As of June 12, 1960, reserved water may be utilized under the Multiple Use Act of 1960 to fulfill the above-stated purposes, as well as the following:
   a. Range,
   b. Outdoor recreation,
   c. Wildlife and fish.

In accord with this limitation, the Master-Referee is of the opinion that the United States has demonstrated that reserved waters may be employed on each of the national forests in quantities, as shall be determined in accord with this report, sufficient to fulfill their purposes.

(1) *Uses Permissible Under the Creative Act of 1891 and the Organic Act of 1897.*

The following specific uses may be made pursuant to the reserved right for national forests in accordance with the general purposes of the forests under the Creative Act of 1891 and the Organic Act of 1897:

1. Growth, management, timber, and production uses, including but not limited to irrigation of trees, nurseries, cone orchards, and seed production areas. Tr. Dec. 12, 1972, pp. 68-77.
2. Domestic uses, including but not limited to domestic uses at Forest Service administrative-site facilities. *Id.,* pp. 80-82.
3. Municipal uses, including but not limited to fire protection and prevention, lawn watering at forest service administrtive sites. *Id.,* pp. 82-84.
4. Administrative-site uses, including but not limited to lawn watering at ranger stations and other administrative sites, care of Forest Service equipment, personal uses of Forest Service employees at ranger stations and other administrative sites, watering of Forest Service horses at other forest service administrative sites. *Id.,* pp. 84-85.
5. Agriculture and irrigation uses, including but not limited to irrigation of hay for forest service horses, provided that no reserved water is used to irrigate meadows and range land used by permittees, lessees, or other persons using forest land by permission or consent of the Forest Service, and provided further that no reserved water is used to irrigate feed of any sort for use by wildlife. *Id.,* pp. 85-87.
6. Stock grazing and watering uses, including but

not limited to watering uses for Forest Service horses provided that no reserved water is used for stock grazing and watering of stock belonging to persons using forest lands as permittees, lessees, or under any other form of forest service permission. *Id.,* pp. 91-95.

7. Fire fighting and prevention uses, including but not limited to uses for fighting and prevention of land fires or structure fires within forest lands. *Id.,* 96-98.
8. Forest improvement and protection uses, including but not limited to tree planting uses, tree spraying, control of managed fires, irrigation of reseeded species of trees. *Id.,* pp. 98-102.
9. Drinking and sanitary uses, including but not limited to drinking and sanitary uses at Forest Service and other administrative sites. *Id.,* pp. 102-104.
10. Road watering uses, including but not limited to watering of roads during road construction, watering of roads to prevent wind erosion thereof, revegetation of road cuts. *Id.,* pp. 104-105.
11. Watershed protection and management and the securing of favorable conditions of water flow uses, including but not limited to uses for prevention of soil erosion, flood control, irrigation and restoration of areas damaged or denuded by forest fires and other phenomena. *Id.,* pp. 105-109.

(2) *Uses Permissible Under the Multiple Use Act of 1960.*

The following specific uses, as well as the uses listed

above, may be made purusant to the reserved right for national forests in accordance with the general purposes of the forests under the Multiple Use Act of 1960:

1. Recreational uses, including but not limited to uses for national forest campgrounds, picnic areas, organization sites, and other Forest Service recreational facilities, provided that no reserved water is utilized by any permittee, lessee, or other person operating any facility on the national forest under any form of Forest Service permission. *Id.,* pp. 77-80.
2. Agriculture and irrigation uses, including but limited to irrigation of wildlife feed such as corn and millet, provided that no reserved water is used by permittees, lessees, or other persons using forest land by permission or consent of the Forest Service, irrigation of experimental forage under study by the Forest Service. *Id.,* pp. 85-88.
3. Uses for the development, conservation, and management of migratory wildlife and wildlife resources, including but not limited to watering of wildlife, diversions and impoundments for maintenance of fish life. *Id.,* pp. 88-91.
4. Stock grazing and watering uses, including but not limited to irrigation for enhancing and improving range forage, provided that no reserved water is used by permittees, lessees, or other persons using national forest land under Forest Service consent or permission. *Id.,* pp. 91-95.
5. Wilderness preservation uses, including but not limited to fighting and prevention of forest fires. *Id.,* pp. 109-111.

6. Uses for preservation of scenic, aesthetic, and other public values, including but not limited to campground facilities. *Id.*, pp. 111-114.

7. Uses for fish culture, conservation, habitat protection and management, including but not limited to the attainment and maintenance of minimum stream flows and lake levels as are necessary to:

   a. Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters as of June 12, 1960, the effective date of the Multiple Use Act of 1960, or the applicable reservation date, whichever is later. *Id.*, pp. 115-125.

   b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the national forests as of June 12, 1960, the effective date of the Multiple Use Act of 1960, or the applicable reservation date, whichever is later. *Id.*, pp.115-125.

2. *Purposes of Rocky Mountain National Park.*

The purposes for which Rocky Mountain National Park (the only national park involved in this litigation) were created received much less attention at hearings, in briefs, and in oral arguments than was given to the issue of national forest purposes. There are undoubtedly several reasons for this, perhaps the most significant being that the amounts of water involved and potential injury to the objectors are not so great as for national forests. Nevertheless, since waters available under the reservation doctrine are related specifically to the purposes of the reservation, the issue of park purposes must be explored and resolved fully.

a. *Claim of the United States and Objections Thereto.*

In its statements of claim and applications, the United States claimed that Rocky Mountain National Park was created for the following numerous purposes:

1. Recreation;
2. Domestic uses;
3. Municipal and administrative-site uses;
4. Agriculture and irrigation;
5. Stock grazing and watering;
6. The development, conservation, and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;
7. Fire fighting and prevention;
8. Forest growth, management, improvement, and protection;
9. Commercial, drinking, and sanitary uses;
10. Road watering;
11. Watershed protection and management and the securing of favorable conditions of water flows;
12. Wilderness preservation;
13. Flood, soil, and erosion control;
14. Preservation of scenic, aesthetic, and other public values; and
15. Fish culture, conservation, habitat protection, and management.

With respect to the final category listed, the United States claimed the right to utilize reserved waters for the maintenance of continuous, uninterrupted flows of water and minimum stream and lake levels.

At least one of the objectors has taken the position that Rocky Mountain National Park was withdrawn for narrower purposes. *See* Answer Brief of Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District, pp. 17-18. It cites 16 U.S.C. §1, which provides in pertinent part:

> ". . . the fundamental purpose of the said parks, . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

This statute applied to national parks in general. The objector also cites 16 U.S.C. §191, which established Rocky Mountain National Park in 1915. In pertinent part it states that the park is:

> ". . . reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and is dedicated and set apart as a public park *for the benefit and enjoyment of the people of the United States, under the name of the Rocky Mountain National Park . . .*" (emphasis supplied)

Finally, the Secretary of the Interior, under whose control

the park lies, may, according to 16 U.S.C. §195, issue reasonable rules and regulations for the park:

> ". . . as he may deem necessary or proper for the care, protection, management, and improvement of the same, *the said regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof.*" (emphasis supplied)

It should be noted that the United States in its brief and oral arguments, while not affirmatively abandoning the broad statement of purposes made in its claim, did cite these very same statutes when discussing the purpose of the park. *See* Opening Brief of the United States, pp. 10-11; Argument of Mr. Meshorer, Tr., Dec. 5, 1974, pp. 23-24. In addition, the United States recognized these statutory purposes in its proposed findings. *See* Proposed Findings of Fact, Conclusions of Law, and Decree of the United States, p. 2-3.

b. *Discussion of Purposes.*

No extensive discussion of the purposes of Rocky Mountain National Park is necessary. Congress, the only body with the power to manage and dispose of federal property, *U.S. Const.*, Art. IV, §3, has made abundantly clear the purposes for which the national park was reserved. Its "fundamental purpose," like that of all national parks, is to conserve and maintain in an unimpaired condition the scenic, aesthetic, natural, and historic objects of the park, as well as the wildlife therein, in order that the park might provide a source of recreation and enjoyment for all generations of citizens of the United States. *See* 16 U.S.C. §§1, 195. The park was not established, as were the

forests, for economic reasons, but rather was intended to be a place used ". . . for the benefit and enjoyment of the people of the United States. . ." This interpretation is the only reasonable one in light of the various pertinent statutes, and indeed appears to comply even with the views of the United States in the various materials submitted by it subsequent to its claim. The Master-Referee must conclude that Rocky Mountain National Park was withdrawn and reserved for the purposes clearly stated in the statutes cited above.

c. *Limitations on Water Uses by the United States Within Rocky Mountain National Park.*

One of the objectors in this action, the Water Supply and Storage Company, is the owner of the Grand Ditch which extends fourteen miles into Rocky Mountain National Park. With a decree date of September, 1890 (*see* Jackson County Water Conservancy District Ex. No. 5, D and D-1), the ditch long predates the establishment of the park. The objector contends that any reserved rights of the United States appurtenant to Rocky Mountain NationalPark must be subordinate to the rights of the Grand Ditch.The Master-Referee concludes that the contention of the objectors is valid.

Initially, it must be noted that the United States has made no claim to waters which were appropriated under Colorado law as of the date of the creation of the national park or any other of the reservations involved in this case. No such claim could be made as, under the reservation doctrine, only unappropriated waters may be reserved. Since the Grand Ditch substantially predates the establishment of Rocky Mountain National Park, no reserved water rights appurtenant to the park may be found to

supersede water rights in the Grand Ditch perfected under Colorado law.

Further support for this contention may be found in the various acts of Congress dealing with the park. The portion of the park in which the Grand Ditch is located was reserved for park purposes by the Act of June 21, 1930. 46 Stat. 791 (1930), 16 U.S.C. §192b. In 16 U.S.C. §192c, also enacted as part of that Act, it is provided:

> *"Nothing contained in section 192b of this title shall affect any vested and accrued* rights of ownership of lands or any valid existing claim, location, or entry existing under the land laws of the United States on June 21, 1930, whether for homestead, mineral, rights-of-way, or any other purposes whatsoever, or any *water rights and/or rights-of-way connected therewith, including reservoirs, conduits, and ditches, as may be recognized by local customs, laws, and decisions of courts,* or shall affect the right of any such owner, claimant, locator, or entryman to the full use and enjoyment of his land." (emphasis supplied)

Under 16 U.S.C. §198, the United States accepted Colorado's cession of jurisdiction over Rocky Mountain National Park. The United States assumed sole and exclusive jurisdiction over the park, saving, *inter alia:*

> ". . . to the people of Colorado all vested, appropriated, and existing water rights and rights-of-way connected therewith including all existing irrigation conduits and ditches."

These statutes make it clear that the establishment and management of at least that portion of the park in which the Grand Ditch is located was not intended by Congress to interfere with or affect any vested or accrued water rights within its boundaries. The Grand Ditch is one such water right within the park. Thus, no reservation of waters for use on the lands of the national park can be permitted to supersede the water rights of the Water Supply and Storage Company in the Grand Ditch.

d. *Minimum Stream Flows and Lake Levels.*

As in the case of the national forests involved herein, the question of whether the United States may be granted the right to use water under the reservation doctrine to maintain certain minimum stream flows and lake levels within Rocky Mountain National Park is of significance. The Master-Referee has treated the general question of validity of in-place uses under the reservation doctrine fully in his discussion of reserved rights on the national forests. *See* §V.C.1.e.(4), *supra.* Rather than repeating that discussion here, it is incorporated by this reference.

With respect to the more specific question of whether in-place uses may exist to serve the purposes of Rocky Mountain National Park, the Master-Referee is of the opinion that they do so exist. The conclusion may be even more inescapable than the similar one regarding the national forests. The whole aim of the national park is to provide a source of recreation, in an unimpaired natural setting, for all generations of citizens of the United States. Maintenance of certain minimum flows and lake levels on the national park is absolutely essential to the accomplishment of that aim. To permit the drying up or dewatering of streams would be wholly inconsistent with the purposes of the park. As was also true for national forests, the fact

that the uses are in-place rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States intended to reserve water sufficient to fulfill the purposes of Rocky Mountain National Park, as of the various dates of its reservation, and that the United States is entitled to a reserved right for such purposes, subject to quantification in accordancewith the first sentence of §37-92-103(4), C.R.S. 1973.

e. *Priority Date of Rocky Mountain National Park Reserved Right.*

It has been noted, *see* §V.A., *supra,* and will be discussed at greater length in a subsequent section, *see* §V.D.,*infra,* that the priority date to which the reserved water right is entitled is the date on which the land to which the claimed waters are appurtenant was reserved. This is true in the case of Rocky Mountain National Park as well, though the facts create a small variation in the application of this principle. Rocky Mountain National Park was created by the transfer of land which had been previously reserved for national forest purposes. The reserved right recognized on behalf of the park lands must, therefore, bear a priority date as of the date that the park lands were *transferred* to the park and not the date that they were originally reserved for national forest purposes. This priority date is entirely in keeping with the limitation stated in the decree in *Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 l. Ed. 2d 757 (1964), which awarded a priority date to both Indian and non-Indian reserved rights equivalent to the date of reservation *for relevant reservation purposes* of each area of the reservation upon which water was used. Here the national park reserved right obtains a priority

date as of the date that the lands comprising the park were transferred from the national forest *for park purposes.*

f. *Water Uses Which May Be Made to Fulfill the Purposes of Rocky Mountain National Park.*

As in the case of the national forests, various types of uses may be made of reserved waters to fulfill the purposes for which Rocky Mountain National Park was established. *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v. California,* 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). No use may be allowed, however, unless it does in fact go to the fulfillment of a valid purpose of the national park as set forth above. The United States has demonstrated that reserved waters may be employed on the national park for the following uses in quantities, as shall be determined in accordance with this report, sufficient to fulfill the purposes of the park:

1. Recreational uses including, but not limited to, aesthetic uses, campground uses, visitor center uses, attendant facility uses, camper facility uses. Tr. Dec. 14, 1972, pp. 180-181.
2. Domestic uses including, but not limited to, ranger residence uses, ranger station uses. *Id.,* p. 181.
3. Municipal uses including, but not limited to, campground watertand sewer uses, fire protection uses, concessional uses. *Id.,* pp. 181-182.
4. Administrative-site uses including, but not limited to, park office and shop uses. *Id.,* p. 182.
5. Agricultural and irrigation uses including, but not limited to, watering of lawns surrounding

park buildings and structures, campground uses where needed to offset heavy human impact, irrigation of hay for feeding of wildlife. *Id.,* pp. 182-183.

6. Stock grazing and watering uses including, but not limited to, watering of horses and mules of the United States, watering of horses and mules of visitors to the national parks. *Id.,* pp. 183-184.
7. Development, conservation, and management of resident and migratory wildlife and wildlife resources including, but not limited to, watering uses for wildlife. *Id.,* pp. 184-185.
8. Fire fighting and prevention uses including, but not limited to, uses for fighting and preventing wild land or forest fires and structural fires. *Id.,* p. 185.
9. Forest growth and management, improvement, and protection uses including, but not limited to, irrigation of forest areas impacted by heavy human use, forest protection activities necessary to maintain aesthetic and scenic values. *Id.,* p. 185-186.
10. Commercial drinking and sanitary uses including, but not limited to, concession uses, attendant facility uses, provided that all such uses are operated by the United States and not by private individuals having permits, leases, or other permission from the United States. *Id.,* pp. 186-187.
11. Watershed protection and management uses including, but not limited to, reforestation activities necessary to return the watershed to its natural condition. *Id.,* pp. 188-189.

12. Wilderness preservation uses. *Id.*, p. 188.
13. Flood, soil, and erosion control uses including, but not limited to, irrigation of areas subjected to heavy human use. *Id.*, pp. 188-189.
14. Preservation of scenic, aesthetic, and other public values uses. *Id.*, p. 189.
15. Fish culture, conservation, habitat protection, and management uses including, but not limited to, the attainment of minimum stream and lake levels as are necessary to:
    a. Insure the continued nutrition, growth conservation, and reproduction of those species of fish which inhabited such waters on the date that each area of land in the park on which water is used was reserved. *Id.*, p. 190.
    b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the date that each area of land in the park on which water is used was reserved. *Id.*, p. 190.

3. *Purposes of the National Monuments.*

As in the case of Rocky Mountain National Park, the issue of the purposes of the national monuments was not litigated with the same intensity as were the purposes of the national forests. Since the purposes of the monuments so closely parallel those of the national park, this is not surprising. A full exploration of those purposes follows.

a. *Claim of the United States and Objections Thereto.*

In its applications for reserved water rights on the national monuments, the United States again took the approach that the monuments had been created for numerous and broad purposes, including:

1. Recreation;
2. Domestic uses;
3. Municipal and administrative-site uses;
4. Agriculture and irrigation;
5. Stock grazing and watering;
6. The development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including bird, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;
7. Fire fighting and prevention;
8. Forest growth, management, improvement, and protection;
9. Commercial, drinking and sanitary uses;
10. Road watering;
11. Watershed protection and management and the securing of favorable conditions of water flows;
12. Wilderness preservation;
13. Flood, soil, and erosion control;
14. Preservation of scenic, aesthetic, and other public values;
15 Fish culture, conservation, habitat protection, and management.

It was with respect to the final category listed that the United States claimed the right to utilize reserved waters for the maintenance of continuous uninterrupted flows of water and minimum stream and lake levels.

Again, at least one objector actively took the position that the monuments were withdrawn for narrower purposes. *See* Answer Brief of the Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District, p. 19. It cites 16 U.S.C. §1, which provides in pertinent part:

> ". . . the fundamental purpose of the said . . . monuments . . . is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for th enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The statute established the "fundamental purpose" of all national monuments, including those with which this litigation is concerned.

It should be noted that, while never formally retracting the broad purposes set forth in its applications, the United States did appear to recognize the validity of the narrower purposes stated by 16 U.S.C. §1. *See* Proposed Findings of Fact, Conclusions of Law, and Decree of the United States, pp. 23, 33, 41.

b. *Discussion of Purposes.*

The purposes for which the national monuments were created are clear. The "fundamental purpose" of all national monuments is to conserve and maintain in an unimpaired condition their scenic, aesthetic, natural, and historic objects, as well as the wildlife therein, in order

that the monuments might provide a source of recreation and enjoyment for all generations of citizens of the United States. 16 U.S.C. §1. This interpretation is reinforced by 16 U.S.C. §431, which authorizes the President to establish national monuments for the proper care of ". . . historic landmarks, historic and pre-historic structures and other objects of historic or scientific interests." Such interpretation is also reinforced by the various documents which reserved the lands now constituting the monuments involved herein. They stress the conservatory function of the monuments and acknowledge their role in preserving various natural and historic phenomena. *See,* for example, Pres. Proc. March 2, 1933, re Black Canyon of the Gunnison Nat. Mon.; Proc. May 24, 1911, re Colorado Nat. Mon.; Pres. Proc. Oct. 4, 1915, re Dinosaur Nat. Mon. The Master-Referee concludes that the purposes of the national monuments in this litigation are those stated by 16 U.S.C. §1.

c. *Minimum Stream Flows and Lake Levels.*

Since the United States seeks the right to utilize reserved waters in the national monuments to maintain certain minimum stream flows and lake levels, the question of whether those uses can be granted in the monuments must be addressed. The Master-Referee is of the opinion that such in-place uses are valid under the reservation doctrine and that certain requested uses may be granted for the benefit of the national monuments involved in this matter. The Master-Referee has treated the general question of the validity of in-place uses under the reservation doctrine fully in his discussion of reserved rights on the national forests. *See*V.C.1.e.(4), *supra.* Rather than repeating that discussion here, it is incorporated by reference.

With respect to the more specific question of whether in-place uses may exist to serve the purposes of the na-

tional monuments involved herein, the Master-Referee is of the opinion that they do so exist. Such conclusion seems inescapable when considered in light of the recent decision in *Cappaert v. United States,* _____ U.S. _____ (June 7, 1976) (44 L.W. 4736), which found a reserved right to maintain a certain water level in the Devil's Hole National Monument.* The fundamental aim of the national monuments is to provide a source of enjoyment, in an unimpaired natural setting, for all generations of citizens of the United States. Maintenance of certain minimum flows and lake levels on the national monuments is absolutely essential to the accomplishment of that aim. To permit the drying up or dewatering of streams on national monuments would be wholly inconsistent with their purposes. That the uses are in-place, as in the case of national forests and the national park, rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States intended to reserve water sufficient to fulfill the purposes of each of the national monuments and that the United States is entitled to a reserved right for such purposes, subject to quantification in accordance with the first sentence of §37-92-103(4), C.R.S. 1973.

d. *Water Uses Which May Be Made to Fulfill the Purposes of the National Monuments.*

As in the case of each of the other reservations herein, various types of uses may be made of reserved waters to fulfill the purposes for which the national monuments were established. *Arizona v. California,* 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v.*

*The *Cappaert* decision cannot be regarded as controlling herein for it involved a different monument, established for its own distinctive purposes. Its reasoning, however, is highly persuasive.

California, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). This is the essence of the reservation doctrine. No use may be allowed, however, unless it does in fact go to the fulfillment of a valid purpose of the national monuments as set forth above. The Master-Referee is of the opinion that the United States has demonstrated that reserved waters may be employed on the national monuments for the following uses in those quantities, as shall be determined in accord with this report, sufficient to fulfill the purposes of the reservation. It should be noted that certain uses may be allowed on one or two of the monuments herein, but not on the remainder. This is so because the United States did not demonstrate that such a use had been implemented on that particular monument. This situation will be noted below when it arises. With that in mind, the following uses of reserved water should be granted:

1. Recreational uses including, but not limited to, drinking for the general public. Tr., Jan. 24, 1973, pp. 66-67, 107.
2. Domestic uses including, but not limited to, campground uses, public drinking uses. *Id.*, pp. 67-68, 107.
3. Agriculture and irrigation including, but not limited to, irrigation or reseeding of roadsides, reestablishment of natural grasses. *Id.*, pp. 68-69, 108.
4. Stock grazing and watering including, but not limited to, watering of horses of Park Service employees and horses of visitors to the monument, provided that no reserved water is utilized for stock grazing and watering of stock belonging to persons using monument lands as

permittees, lessees, or under any other form of United States permission. *Id.*, pp. 69-70, 108-109.

5. Uses for the development, conservation, and management of resident and migratory wildlife, including but not limited to, watering of wildlife on the national monuments. *Id.*, pp. 70-72, 109.

6. Fire fighting and prevention uses including, but not limited to, water for fighting and preventing wild land or forest fires and structural fires. *Id.*, pp. 72, 109.

7, Forest improvement and protection uses including, but not limited to, irrigation for the sustenance of natural tree growth, irrigation of areas impacted by heavy human use, water for fighting and prevention of wild land or forest and structural fires. *Id.*, pp. 72-73, 109.

8. Commercial and sanitary uses including, but not limited to, concession and other tourist-related uses, provided that no reserved water is utilized by such uses where such uses are operated by private individuals having permits, leases, or other permission from the United States. *Id.*, pp. 73-74, 109-110.

9. Road watering uses including, but not limited to, water for compaction of roads. *Id.*, pp. 73, 110.

10. Wilderness preservation uses, *Id.*, 75-76, 110.

11. Flood, soil, and erosion control uses including, but not limited to, waters used for the protection and restoration of natural vegetation. *Id.*, pp. 74-75, 110-111.

12. Uses for the preservation of scenic, aesthetic, and other public values. *Id.*, pp. 76-77, 111.

13. Uses for fish culture, conservation, habitat protection, and management, including, but not limited to, minimum stream and lake levels as are necessary to:

    a. Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters on the date that each area of land on which water is used within each of the national monuments was reserved.

    b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the date that each area of land on which water is used within each of the national monuments was reserved, provided that in the Dinosaur National Monument, no minimum stream flow shall be available except for the Yampa River and not for the Green River or any tributaries of the Yampa or Green Rivers, and provided further, that in the Black Canyon of the Gunnison National Monument no minimum stream flows shall be available except for the Gunnison River and not for any other streams in said National Monument, and provided further that in the Colorado National Monument, no water shall be used for fish culture, conservation, habitat protection, and management, including the attainment and maintenance of minimum stream flows and lake levels. *Id.*, 77-80, 111-113.

(pp. 190-314, Vol. 1, Partial Master-Referee Report Covering All of the Claims of the United States of America.)

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12174

AVONDALE IRRIGATION DISTRICT, DALTON GARDENS IRRIGATION DISTRICT, and HAYDEN LAKE IRRIGATION DISTRICT,	)	
Plaintiffs,	)	
v.	)	Pocatello term, September,
NORTH IDAHO PROPERTIES, INC., and Idaho corporation, et al,	)	1977
Defendants,	)	
and	)	
UNITED STATES OF AMERICA,	)	
Intervenor-appellant,	)	
and	)	
ROBERT J. ADAMSON, et al,	)	
and	)	
R. KEITH HIGGINSON, Director of Water Administration, Idaho State Department of Water Administration	)	
Intervenor-respondents.	)	Filed: March 15, 1978

No. 12482

JOHN SODERMAN and MARTHA SODERMAN, husband & wife; FARRELL STOOR and MARGARET STOOR, husband & wife; FRANK STOOR and PAT STOOR, husband & wife; OSCAR VIAS and VERDA VIAS, husband & wife; ALFRED VIAS, a single man; JACK NUFFER and PHYLLIS NUFFER, husband & wife; LEITH R. SOMSON and VIRGINIA SOMSON, husband & wife; and DAN MORAN, a single man,

Plaintiffs,

v.

DR. EVAN KACKLEY and LOIS KACKLEY, husband & wife; J. C. SMITH and VERA D. SMITH, husband & wife; BLUE MOUNTAIN GRAZING ASSOCIATION, INC., a corporation; UNITED STATES OF AMERICA through the UNITED STATES FOREST SERVICE, Department of Agriculture; THE BUREAU OF INDIAN AFFAIRS, Department of the Interior; THE STATE ENGINEER, Department of Reclamation, STATE OF IDAHO,

Defendants,

and

R. KEITH HIGGINSON, Director, Idaho Department of Water Resources,

Cross-claimant, Appellant,

v.

UNITED STATES FOREST SERVICE,

Cross-defendant, Respondent.

R. H. Young, Clerk

Appeal No. 12174 from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Hon. Watt E. Prather, District Judge. *Affirmed.*

Appeal No. 12482 from the District Court of the Sixth Judicial District of the State of Idaho, Caribou County. Hon. Francis J. Rasmussen, District Judge. *Reversed and remanded.*

Consolidated appeals from judgments concerning federal reserved water rights.

Wayne L. Kidwell, Attorney General, and Josephine P. Beeman, Assistant Attorney General, Boise, Idaho, for Department of Water Resources.

Paul L. Westberg, United States Attorney, Boise, Idaho; Larry G. Gutterridge, United States Department of Justice, Washington, D.C., for United States.

BAKES, J.

III

. . . It is now well established that when the federal government reserves land from the public domain it also, by implication, reserves rights to the appurtenant and then unappropriated water necessary to accomplish the purpose of the reservation. This reserved water right vests on the date of the reservation and is superior to the rights of subsequent appropriators. Cappaert v. United States, 426 U.S. 128, 96 S. Ct. 2062 (1976); Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971); Arizona v. California, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963); Winters v. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908); *see* Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water, 1975 B.Y.U.L. Rev. 639.

Although originating in a case concerning water rights on an Indian reservation, Winters v. United States, *supra,* this reserved water rights doctrine has been held to apply to other federal enclaves including national forests. Cappaert v. United States, *supra;* United States v. District Court for Eagle County, *supra;* Arizona v. California, *supra.* This doctrine was most recently considered by the United States Supreme Court in Cappaert v. United States, *supra.* That case involved reserved water rights in an underground pool in Devil's Hole National Monument inhabited by a unique species of desert fish. Heavy pumping of groundwater for irrigation purposes on private land several miles away caused the water level in the pool to drop below the minimum level necessary for propagation of the rare fish species. The Supreme Court concluded that the protection of this rare fish species was a purpose for which the Devil's Hole National Monument was created in 1952. Therefore the Court held that under the reserved water rights doctrine the United States was entitled to have the groundwater pumping, which had commenced subsequent to the creation of the Devil's Hole National Monument, curtailed, but only to the extent necessary to preserve the minimum water level necessary for preservation of the fish species.

Similarly, in these two cases the United States asserts a reserved non-consumptive right to the natural flow of these several streams in two national forests. However, as the Supreme Court made clear in *Cappaert,* the United States is entitled to such a water right only if, and only to the extent it "is necessary to fulfill the purpose of the reservation, no more." 426 U.S. at 141, 96 S. Ct. at 2071.

In *Cappaert* the United States Supreme Court ascertained the purpose for which the Devil's Hole National Monument was reserved by examining the presidential proclamation creating it and the statutory authorization for the reservation. We must do the same in these cases in order to determine the

purposes for which the Coeur d'Alene and Caribou National Forests were created.

These two national forests were created by presidential proclamations – the Coeur d'Alene National Forest on November 6, 1906, 34 Stat. 3256, and the Caribou National Forest on January 15, 1907, 34 Stat. 3267.[6] These proclamations do not indicate the purpose for the reservations, but do state that the reservations were made pursuant to section 24 of the Creative Act of 1891. Section 24 of that Act states:

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as [national forests], and the President shall, by public proclamation, declare the establishment of such [forests] and the limits thereof." Ch. 561, §24, 26 Stat. 1095, 1103 (1891) (codified at 16 U.S.C. §471).

That statute does not state the purpose for which the President may reserve public lands as national forests, just the requirement that the public land reserved be covered with timber or undergrowth. However, the congressional debates and memorials read in those debates suggest that Congress was concerned with the preservation of timber stands in order to assure a continuous supply of timber and the protection of watersheds in mountainous areas in order to control the water flows in the lower valleys.[7]

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[6] The reservations are referred to as forest reserves in the presidential proclamations and early statutes. The name was later changed to national forest. Ch. 2907, § 1, 34 Stat. 1256, 1269 (1907).

[7] *See* 21 Cong. Rec. 2537-39 (1890); 22 Cong. Rec. 3611-16 (1891).

Six years later Congress passed what is now referred to as the Organic Administration Act of 1897.[8] That Act provided that national forests were to be established in accordance with the following provisions:

> "All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as [national forests] under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:
>
> "No [national forest] shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." Ch. 2, § 1, 30 Stat. 11, 34-35 (1897) (codified at 16 U.S.C. § 475).

In this Act Congress stated that national forests were to be established for the purpose of securing favorable conditions of water flows and a continuous supply of timber. The United

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8 What is presently called the Organic Act of 1897 was passed as a rider to the Sundry Civil Expense Appropriation Act of 1897, Ch. 4, § 1, 30 Stat. 11, 34-36, and is generally codified at 16 U.S.C. §§ 473-478, 479-482, 551. *See* 30 Cong. Rec. 899 (1897).

States argues that the phrase "to improve and protect the forest within the boundaries" is a separate and distinct purpose for the creation of national forests and refers not only to the protection of trees, but also to the protection and improvement of the entire forest ecosystem, including fish and wildlife, and the forest's aesthetic and recreational qualities. This argument, however, finds no support in the legislative history of the Act. Despite repeated references in the congressional debates to the need to preserve timber resources and protect watersheds, no mention is made of fish and wildlife or the aesthetic and recreational qualities of the forests.[9] Moreover, the Organic Act expressly provides that water within the national forest may be used for domestic, mining, milling and irrigation purposes.[10] It would indeed be anomalous for this Court to infer, as the United States asks it to do in these cases, a congressional intent to reserve the entire natural flow of these streams when Congress explicitly authorized and contemplated private consumptive use of these same streams.

The Organic Act further provides that it is not to be "construed to prohibit the egress and ingress of actual settlers" or to "prohibit any person from entering upon such

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9 *See, e.g.*, 30 Cong. Rec. 899-917, 963-1010 (1897) (debates preceding the enactment of the Organic Act of 1897); 25 Cong. Rec. 2371-75, 2430-35 (1893), and 27 Cong. Rec. 85-86, 109-15 (1894) (committee report and debates on the 1892 McRae Bill, H.R. 119. This bill, which was passed by the House but not the Senate, is the forerunner of and substantially the same as the Organic Act of 1897). *See generally* Bassman, The 1897 Organic Act: A Historical Perspective, 7 Nat. Res. Law. 503 (1974).

10 "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 481).

forest reservation for all proper and lawful purposes."[11] The Secretary of Agriculture[12] is also authorized to "regulate their occupancy and use."[13] The United States argues that this mandate for regulation of the occupancy and use of the forests indicates that Congress envisioned uses broader than timber management and watershed protection. We agree that Congress contemplated that the public land reserved as national forests would continue to serve a variety of public uses. In United States v. Grimaud, 220 U.S. 506, 31 S. Ct. 480 (1911), the United States Supreme Court stated:

> "From the various acts relating to the establishment and management of forest reservations, it appears that they were intended

11 "Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of [Agriculture]. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 478).

12 The "forest reserves" were originally administered by the Secretary of the Interior. In 1905 Congress transferred control to the Secretary of Agriculture. Ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472).

13 "The Secretary of [Agriculture] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . . ." Ch. 2, § 1, 30 Stat. 11, 35 (1897) (codified at 16 U.S.C. § 551).

> 'to improve and protect the forest and to secure favorable conditions of water flows.' It was declared that the act should not be 'construed to prohibit the egress and ingress of actual settlers' residing therein, nor to 'prohibit any person from entering upon such forest reservations for all proper and lawful purposes, . . . ' (Citations omitted). It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; . . . ' (Citations omitted).
>
> "Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another." *Id.* at 515-516, 31 S. Ct. at 482.

Congress chose not to prohibit all public use of the national

forests, but chose to permit lawful uses of the forest land and water subject to regulation to insure that such uses did not interfere with the purposes, timber management and watershed protection, for which the reservations were created. However, the diverse uses which the public has made of the forests cannot be equated with the purposes for which they were originally created. Mimbres Valley Irr. Co. v. Salopek, 564 P. 2d 615 (N.M. 1977), *cert. granted sub nom.* United States v. New Mexico, 46 U.S.L.W. 3426 (U.S. Jan. 9, 1978) (No. 77-510). *See also* McMichael v. United States, 355 F. 2d 283 (9th Cir. 1965). Had Congress intended that national forests be created for the purposes of recreation, aesthetics, and fish and wildlife preservation, Congress would have so stated as it did in 1890 when Congress set aside public lands in California as "reserved forest lands" for the "preservation from injury all . . .natural curiosities or wonders . . . in their natural conditions [and protection of] fish and game . . . ." Ch. 1263, §§1 & 2, 26 Stat. 650-51 (1890), and in 1916 in the National Forest Park Service Act which provides that the "fundamental purpose of the said parks, monuments and reservations . . . is to conserve the scenery and the natural and historic objects and the wildlife therein. . . " Ch. 408, §1, 39 Stat. 535 (1916) (codified at 16 U.S.C. §1). *See* Cappaert v. United States, *supra.*

The United States also argues that the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §528, ratifies these additional purposes - recreation, aesthetics, and fish and wildlife preservation - as being among the original purposes for the Creative and Organic Acts. The Multiple-Use Sustained-Yield Act provides in part:

> "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title." 16 U.S.C. §528.

In response to this same argument, the New Mexico Supreme Court in Mimbres Valley Irr. Co. v. Salopek, *supra,* recently concluded:

> "The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be 'supplemental to' the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.
>
> "We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated." *Id.* at 618.

We likewise conclude that the purposes for which the forests were created are determined by the law in existence at the time of their creation, and that the additional "supplemental" purposes described were not among those for

which national forests were created pursuant to the Creative and Organic Acts. *See* West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz, 522 F. 2d 945 (4th Cir. 1975).

We appreciate the growing public concern for the protection of fish and wildlife and the preservation of the aesthetic and environmental qualities of the national forests. We are also sensitively aware of the increasing use of these forests for recreational purposes. We are likewise aware that in an arid state like Idaho there often is simply not enough water to fully accommodate all the worthwhile but competing uses. However, the United States Supreme Court made it very clear in *Cappaert* that claims for federal reserved rights are not to be analyzed in terms of an equitable balancing of competing interests, and we do not do so in these cases. Rather, the United States is entitled to previously unappropriated waters necessary to accomplish the purpose for which the reservations were originally created – no more and no less.

We conclude, therefore, that the Coeur d'Alene and Caribou National Forests were created pursuant to the Creative and Organic Acts for the purpose of preserving a perpetual supply of timber and protecting watersheds to secure favorable conditions of water flows. United States v. Grimaud, *supra;* Light v. United States, 220 U.S. 523, 31 S. Ct. 485 (1911); United States v. Shannon, 160 F. 870 (9th Cir. 1908); Honchak v. Hardin, 326 F. Supp. 988 (D.Md. 1971); United States v. Johnston, 38 F. Supp. 4 (S.D.W.Va. 1941); Mimbres Valley Irr. Co. v. Salopck, *supra.* The preservation of fish cultures and habitats and wildlife, and recreational and aesthetic purposes were not contemplated. Mimbres Valley Irr. Co. v. Salopek, *supra.* Accordingly, any non-consumptive water rights reserved by the United States in these two national forests are limited to the amount necessary to accomplish the purposes of timber and watershed protection.

IV

In its conclusions of law in *Avondale* the district court ruled that fire and erosion control were not among the purposes for which the Coeur d'Alene National Forest was created. This conclusion was erroneous. The control and prevention of forest fires is an integral part of the greater purpose of timber protection and a purpose clearly contemplated by Congress. Bassman, The 1897 Organic Act: A Historical Perspective, 7 Nat. Res. Law. 503 (1974). Similarly, erosion control is an integral part of watershed protection. However, a review of the record in *Avondale* reveals no testimony or other evidence that the non-consumptive use of the entire natural flow or any minimum stream flow is necessary for fire or erosion control.[14] On the basis of evidence adduced at trial, we agree with the district court that the accomplishment of the purposes of timber and watershed protection in the Coeur d'Alene National Forest does not require any minimum stream flow in the Hayden, Yellow Banks and Mokins Creeks. We have already concluded that the propagation of fish is not a purpose for which the Coeur d'Alene National Forest was created. It follows, therefore, that the United States is not entitled to a minimum stream flow in the downstream portion of Hayden Creek crossing private land to enable fish to spawn in the national forest. For these reasons, we affirm the district court's decision in *Avondale*.

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[14] Robert Rice, Deputy Forest Supervisor for the Idaho Panhandle National Forest, testified that the streams are a source for filling small tankers used in fighting forest fires. However, that reference is clearly to a consumptive use of the stream. Claims to consumptive uses are not part of this appeal, but have been resolved in earlier proceedings.